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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 20

J. O. STOLL, PETITIONER,

vs.

WILLIAM GOTTLIEB

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED APRIL 2, 1938.

CERTIORARI GRANTED MAY 16, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No.

J. O. STOLL, PETITIONER,

vs.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 18, 1938.

—4614

[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

[fol. 2-1]

IN APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

DECEMBER TERM, A. D. 1936

WILLIAM GOTTLIEB, Appellee,

vs.

S. A. CROWE, JR., and J. O. STOLL, (Defendants), J. O. STOLL, Appellant

Appeal from the Municipal Court of Chicago

Honorable John J. Rooney, Trial Judge

Abstract of Record—Filed in Supreme Court, May 8, 1937

Placita.
Præcipe.

STATEMENT OF CLAIM

For money due upon three instruments in writing, for value received, made and executed by Ten Fifteen North Clark Building Corporation, payment of which was guaranteed by the defendants, belonging to the plaintiff, who is the legal owner thereof, which became due and payable by the terms of said instruments by anticipation of maturity at plaintiff's election and acceleration by default in payment of interest by the principal obligor; praying [fol. 2-2] judgment against the defendants, jointly and severally, for the sum of One Thousand Five Hundred Eighty Three Dollars and Fifty Cents ($1,583.50), with interest at seven per cent per annum upon One Thousand Five Hundred Dollars ($1,500.00) from November 9th, 1935, to the date of judgment.

Affidavit of Claim by William Gottlieb that there is due from the defendants to the plaintiff the sum of One Thousand Five Hundred Eighty Three Dollars and Fifty Cents

($1,583.50) with interest on One Thousand Five Hundred Dollars ($1,500.00) at seven per cent per annum from the date of filing suit until the date of judgment.

RECITAL AS TO EXHIBITS TO STATEMENT OF CLAIM

Exhibits attached to Statement of Claim, being photostatic copies of three (3) Five Hundred Dollar ($500.00) First Mortgage Bonds due January 15th, 1936, executed by Ten Fifteen North Clark Building Corporation, a corporation, by S. A. Crowe, Jr., its president, and M. C. Stoll, its secretary, bearing a rubber stamp endorsement "the time of payment of this bond and the rate of interest thereon has been changed in accordance with the terms of a certain agreement dated as of July 15th, 1932", with adjusted interest coupons numbered 2 to 10, inclusive, maturing on January 15th and July 15th of each year, beginning on January 15th, 1933, successively, respectively, to the 15th day of January, 1937, and guaranty imprinted on the back of each bond, executed by J. O. Stoll and S. A. Crowe, Jr.

Summons and return of bailiff thereon.

Default.

JUDGMENT BY DEFAULT

Finding of One Thousand Five Hundred Eighty Three Dollars and Fifty Cents ($1,583.50), due plaintiff. Judg-
[fol. 2-3] ment vs. Defant J. O. Stoll for $1,583.50 and costs, and let execution issue therefor.

Execution and return of bailiff thereon.

Notice of a motion to stay execution, vacate judgment, vacate order of default, and quash the writ.

PETITION TO VACATE

Petition to vacate default, judgment, and stay execution.

RULE ON DEFENDANT

Rule that defendant file appearance instanter. Motion of the defendant, J. O. Stoll, to vacate and set aside judg-

ment ordered entered and postponed to December 9th, 1935. Order staying all proceedings.

Order transferring cause to Chief Justice.

RULING ON MOTION TO VACATE

Motion of defendant, J. O. Stoll, to vacate default and judgment of November 25, 1935, ordered entered. Leave given defendant, J. O. Stoll, to appear and defend, that a trial be had notwithstanding the judgment, that the judgment stand as security, and that execution be stayed until further order of Court. Cause set for trial February 27th, 1936. Rule on defendant to file Defense in ten days.

Appearance of J. O. Stoll, and A. W. Froehde, as his attorney.

Defense of J. O. Stoll.

Notice of Motion to Strike Defense.

MOTION TO STRIKE

Written Motion of plaintiff to strike defense.

Motion of plaintiff to strike Defense entered and post-

Job No. 4614. Supreme Court Record —:

poned. To Chief Justice for re-assignment.

ADMISSION OF FACTS

Admission of facts to A. W. Froehde, attorney for defendant, J. O. Stoll, filed March 24, 1936:

[fol. 2-4] Pursuant to the notice to admit facts served upon the plaintiff herein on the 17th day of February, A. D. 1936, the plaintiff herein, by his respective counsel admits, for the purpose of this action only if relevant, the following paragraphs in said notice:

(1) Paragraph- (1), (2), (3), (4);

(2) In paragraph (5) the following fact only, "That a Final Decree has been entered in said proceedings in the

said United States District Court, and the said estate has been closed."

(3) Paragraph- (6) and (8).

Samuel M. Bloomberg, Attorney for Plaintiff.

Receipt for copy.

NOTICE TO ATTORNEY FOR PLAINTIFF TO ADMIT FACTS

"Take notice that the defendant in this action, J. O. Stoll, requires the plaintiff to admit, for the purposes of this action only, in accordance with the Statute and Rules of Court in such case made and provided, the several facts respectively hereunder specified; within five (5) days from the service of this notice:"

Those provisions of said notice which were afterwards admitted, are as follows:

"(1) That on June 20, 1934, Ten Fifteen North Clark Building Corporation filed its petition for reorganization under Section 77-B of the Bankruptcy Act, as Amended, in the United States District Court for the Northern District of Illinois, Eastern Division, which petition was approved as properly filed on July 18, 1934, and that notice [fol. 2-5] of said proceedings was given to the plaintiff herein by mail and publication; as shown by the record of proceedings for reorganization No. 56278 in the said Court;

"(2) That on September 25, 1934, the said Ten Fifteen North Clark Building Corporation filed its proposed Plan of Reorganization in the said proceedings, which Plan provided, amongst other things, that:

'For each One Hundred Dollars ($100.00) principal amount of First Mortgage 6½% Gold Bonds outstanding, with unpaid interest coupons thereto pertaining, there shall be issued and delivered to the holder thereof, by the Olympic Hotel Building Corporation, one (1) share of Common stock.

'Unpaid interest due January 15, 1932, and prior thereto shall be paid in cash at the rate of six and one-half percent (6½%) per annum; unpaid interest due July 15, 1932, shall

be paid in cash at the rate of five per cent (5%) per annum; and to those bondholders who have not received an additional payment of three per cent (3%) in lieu of interest due January 15, 1933, and July 15, 1933, there shall be paid in cash an amount equal to three per cent (3% of the principal amount of their bonds; and all claims of bondholders against Cosmopolitan State Bank, as Trustee, for principal and said interest paid to it by the Debtor and uncollected by such bondholders shall be transferred and assigned to the said Olympic Hotel Building Corporation by order of this court; all accumulated and unpaid interest due since July 15, 1933, shall be deemed waived and cancelled;'

[fol. 2-6] and also:

'* * * the personal guaranty of J. O. Stoll and S. A. Crowe, Jr., of said First Mortgage 6½% Gold Bonds shall be cancelled and surrendered in consideration for the transfer of all the assets of said Debtor to the Olympic Hotel Building Corporation and the surrender of the said Common stock of the Debtor.

'All claims and rights of all stockholders and creditors of Ten Fifteen North Clark Building Corporation shall be, and upon the confirmation of this plan, become discharged and cancelled and shall cease and terminate, and the only rights of such persons, by virtue of said claims, shall be those accruing to them in and through the securities to be issued to them as above provided.'

"(3) That notice of a hearing for the purpose of considering said Plan of Reorganization and any other plan of reorganization which might be proposed and the confirmation thereof, in said proceedings on November 5, 1934, was given to the plaintiff herein by mail and publication; and that the plaintiff herein filed no objections to said Plan of Reorganization, as shown by the record of said proceedings;

"(4) That thereafter said Plan of Reorganization was accepted in writing by or on behalf of creditors holding more than two-thirds (⅔) in amount of the claims in each class and by stockholders if the said Ten Fifteen North Clark Building Corporation holding a majority of the capital-stock of said corporation; and the United States Dis-

trict Court for the Northern District of Illinois, Eastern Division, on November 26, 1934, found:

[fol. 2-7] That said Plan of Reorganization is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders and is feasible;

That said Plan complies with the provisions of subdivision (b) of the said Section 77-B, Bankruptcy Act;

That the offer of the Plan, and its acceptance were in good faith and were not made or procured by any means or promises forbidden by the Bankruptcy Act;

and approved said Plan of Reorganization as having been filed in good faith, without collusion, and as being fair, equitable and feasible, and confirmed the said Plan of Reorganization, and ordered the Debtor through its officers and directors forthwith to execute and carry into effect the said Plan of Reorganization, as so confirmed; and further,

that the provisions of the Plan and the order of confirmation shall be and are binding upon the (1) Debtor, (2) all stockholders thereof, including those who have not, as well as those who have, accepted it, and (3) all creditors, secured or unsecured, whether or not affected by the Plan, and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have, accepted;

as shown by the record of said proceedings;

"(5) * * * That a Final Decree has been entered in said proceedings in the said United States District Court, and the said estate has been closed;

[fol. 2-8] "(6) The plaintiff by an agreement, dated as of the 15th day of July, A. D. 1932, extended the time of maturity of the said bonds to become due and payable January 15, 1937, as will more fully appear by the said agreement recorded in the Recorder's Office of Cook County, Illinois, on December 15, 1932, as document No. 11175855, Book 30419, Page 434;

* * * * * * *

"(8) That said bonds and interest coupons attached thereto are secured by that certain trust deed dated Jan-

uary 15, 1927, recorded in the Recorder's Office of Cook County, Illinois, as document No. 9533309 in Book 24017, on Page 247, and that said trust deed provides, amongst other things, as follows:

'The exclusive right of action hereunder shall be vested in the trustee until refusal on its part to act, and no bondholder shall be entitled to enforce these presents in any proceeding in law or in equity until after demand has been made upon the trustee accompanied by tender of indemnity as aforesaid, and the trustee has refused or failed for 60 days thereafter to act in accordance with such demand,'

* * * * * * * * *

A. W. Froehde, Attorney for the Defendant, J. O. Stoll.

Received a copy of the foregoing notice this 17th day of February, A. D. 1936.

Leo Segall, Attorney for Plaintiff."

[fol. 2-9] ORDER SUSTAINING MOTION TO STRIKE

Motion of plaintiff to strike Defense sustained. Rule on defendant, J. O. Stoll, to file Amended Affidavit of Merits in fifteen days.

AMENDED DEFENSE—Filed April 13, 1936, by the Defendant, J. O. Stoll

"1. That on June 20, 1934, Ten Fifteen North Clark Building Corporation, the maker of said bonds, filed its petition for reorganization under Section 77-B of the Bankruptcy Act, as Amended, in the United States District Court for the Northern District of Illinois, Eastern Division, which petition was approved as properly filed on July 18, 1934;

"2. A list of all known bondholders (including the plaintiff) and creditors of, or claimants against, the Debtor or its property, and the amounts and character of their debts, claims and securities, and the last known postoffice address

or place of business of each creditor or claimant, was filed in said proceedings;

"3. The Court determined for the purposes of the Plan and its acceptance, the division of creditors and stockholders into classes according to the nature of their respective claims and interests, and caused notice of such determination to be given the plaintiff by publication and mailing.

"4. That on September 25, 1934, the said Ten Fifteen North Clark Building Corporation filed its Proposed Plan of Reorganization in the said proceedings, which Plan provided, amongst other things, that:

'For each One Hundred Dollars ($100.00) principal amount of Mortgage 6½% Gold Bonds outstanding, with [fol. 2-10] unpaid interest coupons thereto pertaining, there shall be issued and delivered to the holder thereof, by the Olympic Hotel Building Corporation, one (1) share of Common stock.

'Unpaid interest due January 15, 1932, and prior thereto shall be paid in cash at the rate of six and one-half per cent (6½%) per annum; unpaid interest due July 15, 1932, shall be paid in cash at the rate of five per cent (5%) per annum; and to those bondholders who have not received an additional payment of three per cent (3%) in lieu of interest due January 15, 1933, and July 15, 1933, there shall be paid in cash an amount equal to three per cent (3%) of the principal amount of their bonds; and all claims of bondholders against Cosmopolitan State Bank, as Trustee, for principal and said interest paid to it by the Debtor and uncollected by such bondholders shall be transferred and assigned to the said Olympic Hotel Building Corporation by order of this court; all accumulated and unpaid interest due since July 15, 1933, shall be deemed waived and cancelled;'

and also:

'• • • the personal guaranty by J. O. Stoll and S. A. Crowe, Jr., of said First Mortgage 6½% Gold Bonds shall be cancelled and surrendered in consideration for the transfer of all the assets of said Debtor to the Olympic Hotel Building Corporation and the surrender of the said Common Stock of the Debtor,

'All claims and rights of all stockholders and creditors of Ten Fifteen North Clark Building Corporation shall be, and upon the confirmation of this plan, become discharged [fol. 2-11] and cancelled and shall cease and terminate, and the only rights of such persons, by virtue of said claims, shall be those accruing to them in and through the securities to be issued to them as above provided.'

"5. That notice of a hearing on November 5, 1934, for the purpose of considering said Plan of Reorganization and any other plan of reorganization which might be proposed and the confirmation thereof in said proceedings was given to the plaintiff herein by mail and publication, and the plaintiff herein filed no objections to said Plan of Reorganization;

"6. That thereafter said Plan of Reorganization was accepted in writing by or on behalf of creditors holding more than two-thirds (⅔) in amount of the claims in each class and by stockholders of the said Ten Fifteen North Clark Building Corporation holding a majority of the capital stock of said corporation; and the United States District Court for the Northern District of Illinois, Eastern Division, on November 26, 1934, found:

'That said Plan of Reorganization is fair and equitable, and does not discriminate unfairly in favor of any class of creditors or stockholders and is feasible;

'That said Plan complies with the provisions of subdivision (b) of said Section 77-B, Bankruptcy Act;

'That the offer of the Plan and its acceptance were in good faith and were not made or procured by any means or promises forbidden by the Bankruptcy Act;'

[fol. 2-12] approved said Plan of Reorganization as having been filed in good faith, without collusion, and as being fair, equitable and feasible, and confirmed the said Plan of Reorganization; ordered the Debtor through its officers and directors forthwith to execute and carry into effect the said Plan of Reorganization as so confirmed; and decreed:

'That the provisions of the Plan and the order of confirmation shall be and are binding upon the (1) Debtor, (2) all stockholders thereof, including those who have not, as well as those who have, accepted it, and (3) all creditors,

secured or unsecured, whether or not affected by the Plan, and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have, accepted;'

"7. Thereafter, creditors, of the same class as the plaintiff herein, filed written objections to the cancellation of the guaranty of this defendant and that said confirmation be vacated, which objections were referred to a Special Master to take evidence and make his report and recommendations; and said Special Master heard evidence, the arguments of counsel, filed his report, and recommended that the objections be overruled. The Judges of the United States District Court, pursuant to said recommendations and report, entered an order overruling said objections and again confirmed said Plan of Reorganization, with slight modifications.

"8. That thereafter, pursuant to the said order of the said United States District Court, all the assets of the Debtor were transferred to the Olympic Hotel Building [fol. 2-13] Corporation, and the capital stock of the said Debtor was surrendered by the stockholders, who are the defendants herein; the said Plan was fully and completely carried out, and the holders of bonds in the aggregate amount of Two Hundred Six Thousand Dollars ($206,000.00), to-wit: ninety-six per cent (96%) of the total bonds outstanding, have surrendered and cancelled the bonds and guaranty held by them and accepted stock in lieu thereof, pursuant to said Plan of Reorganization; and further, that a Final Decree has been entered in said proceedings, the said estate has been closed; and said Decree of the United States District Court has not been appealed from, reversed or vacated, and remains in full force and effect.

"9. The plaintiff, who was made a party to said proceedings, pursuant to the provisions of the Bankruptcy Act, is estopped by said proceedings from again adjudicating the same facts and issues in this suit; the decree of the United States District Court is binding upon the plaintiff and this Court, and the plaintiff is entitled only to fifteen (15) shares of capital stock of Olympic Hotel Building Corporation, and the sum of Forty-five Dollars ($45.00) cash, which this defendant is able, ready and willing, and hereby

offers to deliver to the said plaintiff upon surrender of said bonds together with interest coupons and guaranty affixed thereto.

Affidavit.

Jurat."

Notice to Admit Facts.

ORDER OF DISMISSAL

Order dismissing suit for want of prosecution. Judgment in favor of defendant, J. O. Stoll, and against the plaintiff for costs.

[fol. 2-14] Notice of motion to vacate order of dismissal for want of prosecution, and to set for trial.

Certified copy of Decree of the United States District Court for the Northern District of Illinois, Eastern Division, filed herein on April 17, 1936, as follows, amongst other things:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Proceedings for Reorganization

No. 56278

In the Matter of TEN FIFTEEN NORTH CLARK STREET BUILDING CORPORATION, Debtor

CONFIRMATION OF PLAN OF REORGANIZATION

"This cause coming on to be heard upon the petition of the Debtor heretofore filed herein on September 25th, 1934, for an order setting the time for a hearing for consideration and confirmation of the Plan of Reorganization filed by the Debtor, or any other Plan of Reorganization which might be properly proposed, the report of Edmund D. Adcock, Referee in Bankruptcy, as Special Master, on the Plan of Reorganization and the petition of the Debtor filed herewith for confirmation of said Plan of Reorganization, and the Court having considered the said Report, said peti-

[fol. 2-15] tion for confirmation of the said Plan of Reorganization, and it appearing to the Court:

1. That the Debtor did, on June 20th, 1934, file its petition for reorganization pursuant to the provisions of Section 77-B of an Act to Establish a Uniform System of Bankruptcy throughout the United States, approved July 1st, 1898 and Acts Amendatory thereof, and the debtor herein, having thereafter on, to-wit: July 18th, A. D. 1934, shown to the Hon. William H. Holly, one of the judges of the United States District Court for the Northern District of Illinois, Eastern Division, that the said petition was properly filed under said Section 77-B, an order was then and there entered approving the said petition of the Debtor herein as properly filed.

2. That, thereafter, on, to-wit: July 23rd, 1934, an order was en ed in these proceedings authorizing the Debtor herein to remain in temporary possession of its estate, and August 15th, 1934, was set as the time for a hearing on the question whether or not the Debtor herein should be continued in possession of its estate; and on August 15th, 1934, pursuant to proper notice by publication and mailing to all the known creditors and stockholders of the Debtor herein, as shown by a list filed herein by the Debtor, an order was entered herein ratifying and confirming the said order of July 23rd, 1934, continuing the Debtor in possession of its estate.

3. Thereafter, the Debtor herein, on September 18th, 1934, filed a balance sheet as shown by its books as of June 20th, 1934, together with a statement of its receipts and [fol. 2-16] disbursements from June 20th, 1934, to August 31st, 1934, and on October 16th, 1934, filed its report of receipts and disbursements for the month of September, 1934, and on November 19th, 1934, filed its statement of receipts and disbursements for the month of October, 1934.

4. On September 25th, 1934, the Debtor herein filed its proposed Plan of Reorganization and it was ordered that a hearing be held on November 5th, 1934, for the purpose of considering the said Plan of Reorganization and any other Plan of Reorganization which might be properly proposed, and the confirmation thereof, and notice thereof to be given to creditors and stockholders of and claimants

against the Debtor herein by publication and mailing, which hearing might be continued from time to time by order of the judge, without mailing or publication of further notice.

5. On September 25th, 1934, an order was entered dividing creditors and stockholders into classes, according to the nature of their respective claims and interest, and October 30th, 1934, was fixed as the date after which no claim or interest might participate in any Plan of Reorganization, except on order for cause shown.

6. On November 5th, 1934, pursuant to notice to all known creditors and stockholders by publication and mailing, the hearing for the purpose of considering the Plan of Reorganization filed herein by the Debtor, and the confirmation thereof was held, said Plan of Reorganization was referred to the Honorable Edmund D. Adcock, Referee in Bankruptcy as Special Master for consideration and [fol. 2-17] report, and said hearing was continued to November 26th, 1934.

7. On November 21st, 1934, the said Hon. Edmund D. Adcock, Referee in Bankruptcy as Special Master, filed his report finding:

a. The Plan is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders and is feasible.

b. It complies with the provisions of subdivis-on (b) Section 77-B of the Bankruptcy Act.

c. The Plan provides that it shall not become effective until it is accepted by the required creditors of each class and by the stockholders of the Debtor, as required by subdivision (e), clause (1) of Section 77-B of the Bankruptcy Act.

d. The Plan complies also with subdivision (e), clause (2) of the Bankruptcy Act.

. . . . . .

f. It appears that the Plan presented is in good faith and has not been made or procured by any means or promises forbidden by the Bankruptcy Act.

. . . . . .

h. The Plan also provides that it may be modified or amended as permitted by Section 77B of said Act

and recommending that an order be entered approving said Plan of Reorganization.

"And the court being fully advised in the premises, finds:

[fol. 2-18] A. That the Debtor was on June 20th, 1934, and thereafter, and now is, unable to meet its debts as they mature and to liquidate its obligations, and unless it is granted relief by this court great loss will occur to its creditors and stockholders.

B. That the Plan of Reorganization filed herein by the Debtor has been accepted in writing by or on behalf of creditors holding more than two-thirds in amount of the claims in class 1, as heretofore fixed by order of this court, and more than a majority of claims in Class 3, based upon the capital stock of the Debtor; that no claims have been filed under Class 5, and claims in Class 4 for reasonable expenses and allowance of this proceeding are to be approved by the court.

C. That no objections have been made to the Plan of Reorganization filed herein by the Debtor and no other Plan of Reorganization has been proposed.

. . . . . .

E. That the said Plan of Reorganization is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders and is feasible.

F. That said Plan complies with the provisions of subdivision (b) of said Section 77B.

. . . . . .

I. That the offer of the Plan and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by the Bankruptcy Act, and

[fol. 2-19] J. The Debtor is authorized and the new corporation to which all the assets of the Debtor are to be transferred shall be authorized to take all actions necessary to carry out the plan.

"It is Therefore Ordered and Decreed:

That the report of Edmund D. Adcock, Referee in Bankruptcy, as Special Master, be, and the same is hereby approved.

. . . . . .

That the Plan of Reorganization heretofore filed herein be, and the same is hereby approved as having been filed in good faith without collusion, and as being fair, equitable and feasible, and that the same be, and hereby is confirmed upon filing acceptance in writing by or on behalf of creditors holding more than two-thirds in amount of the claims in Class 2.

That the Debtor, through its officers and directors, proceed forthwith to execute and carry into effect the said Plan of Reorganization as so confirmed, including the transfer of all of its assets, to the new corporation, to be organized, and otherwise performing and carrying out and causing to be performed and carried out all of the acts and transactions on its part required to be performed and carried out, pursuant to said Plan of Reorganization.

. . . . . .

That the provisions of the Plan and this order of confirmation shall be, and are binding upon the (1) Debtor (2) all stockholders thereof, including those who have not, [fol. 2-20] as well as those who have, accepted it, and (3) all creditors, secured or unsecured, whether or not affected by the Plan, and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have, accepted.

November 26, 1934.

Enter:

William H. Holly, Judge."

Certificate of Clerk of United States District Court, Northern District of Illinois, Eastern Division, that the foregoing is a full and true copy of the original order entered November 26, 1934, and that the said order is in full force and effect.

Notice of motion of defendant to vacate judgment, that the Court find the issues for the defendant, and that judgment be entered for the defendant and against the plaintiff.

ORDER VACATING DISMISSAL

Order vacating dismissal for want of prosecution April 15, 1936 and cause reinstated.

Motion of defendant to vacate default and judgment of November 25, 1935, entered, and set for April 21, 1936.

ORDER SUSTAINING MOTION TO VACATE, ETC.

Motion of defendant to vacate default and judgment on November 25, 1935, sustained. Motion of defendant to find issues for the defendant denied. Motion of plaintiff to strike Amended Defense sustained. Rule that defendant [fol. 2-21] amend Defense within ten days. Defendant's election to stand on Amended Defense.

SECOND AMENDED DEFENSE

Second Amended Defense, filed May 29, 1936, same as Amended Defense (Abst. 9-13), with the addition of the following:

"9. On May 14, 1936, the plaintiff herein filed a petition in the District Court of the United States, Northern District of Illinois, Eastern Division, in the matter of Ten Fifteen North Clark Building Corporation, Debtor, in proceedings for Corporate Reorganization, No. 56278, praying that an order be entered vacating or modifying the decrees and orders entered in said proceedings confirming the said Plan of Reorganization theretofore filed in said proceedings and for such other relief as might seem meet and equitable unto the Court; all of which will more fully appear from a copy of said petition attached hereto, marked Exhibit 'A' and made a part hereof. On or about May 19, 1936, the said Ten Fifteen North Clark Building Corporation, by J. O. Stoll, its Treasurer, filed its answer to said petition of the plaintiff, a copy of which answer is attached hereto, marked Exhibit 'B' and made a part hereof. On May 25, 1936, an order was entered in said proceedings in said District Court of the United States denying the said petition of the plaintiff herein, a copy of which order is attached hereto, marked Exhibit 'C' and made a part hereof." Affidavit. Jurat.

and Exhibits attached thereto, as follows:

RECITAL AS TO EXHIBITS TO SECOND AMENDED DEFENSE.

Exhibit "A", Petition of plaintiff in the District Court of the United States, For the Northern District of Illinois, Eastern Division, in the matter of Ten Fifteen North Clark [fol. 2-22] Building Corporation, Debtor, in Proceedings for Reorganization No. 56278, to vacate or modify Final Decree and order confirming Plan of Reorganization.

Exhibit "B", Answer to Petition of William Gottlieb.

Exhibit "C", Order of United States District Court for the Northern District of Illinois, Eastern Division, denying said Petition of William Gottlieb.

Notice of motion to strike Second Amended Defense, and for judgment.

Motion of plaintiff to strike Second Amended Defense entered and set for June 12, 1936.

ORDER DENYING MOTION TO STRIKE

Motion of plaintiff to strike defendant's Second Amended Defense denied.

Beginning of trial and adjournment to June 22, 1936.

FINDING AND JUDGMENT

The Court's finding of the issues vs. the defendant, J. O. Stoll and assessment of damages in the sum of $1,583.00. Motion for a new trial overruled. Exception. Motion in arrest of judgment overruled. Exception.

Judgment for the plaintiff and against the defendant, J. O. Stoll for $1,583.00 and costs.

Motion for judgment notwithstanding the verdict.

MOTION FOR A NEW TRIAL

"Now comes the defendant, J. O. Stoll, by A. W. Froehde, his attorney, and moves the court to vacate and set aside

the verdict heretofore entered herein and grant this de-
[fol. 2-23] fendant a new trial, and as grounds for the said motion represents as follows:

1. The verdict is contrary to the evidence.

2. The verdict is contrary to the law.

3. The verdict is contrary to the law and the evidence.

4. The verdict is against a clear preponderance of the evidence.

5. The Court erred in refusing to find the issues for the defendant at the close of all the evidence offered on behalf of the plaintiff.

6. The evidence offered and received on the part of the plaintiff is insufficient to sustain the verdict or any judgment which may be rendered thereon in this cause.

7. The Court erred in refusing to find the issues for the defendant at the close of all the evidence offered by the plaintiff and the defendant.

8. The verdict clearly evinces undue sympathy of the Court in favor of the plaintiff.

9. The trial court erred in holding as a matter of law that the proceedings, orders and decrees of the United States District Court did not constitute an estoppel to plaintiff's claim in this suit.

10. The trial court erred in holding as a matter of law that the decree of the United States District Court was subject to collateral attack.

11. The trial court erred in holding as a matter of law that the United States District Court did not have juris-
[fol. 2-24] diction of the person of the plaintiff.

12. The trial court erred in holding as a matter of law that the United States District Court did not have jurisdiction of the subject matter of the proceedings in that court.

13. The trial court erred in holding as a matter of law that the United States District Court did not have the power to enter the decree determining the rights of the plaintiff.

14. The trial court erred in holding as a matter of law that the decree of the United States District Court was void.

15. The trial court erred in holding as a matter of law that the question of jurisdiction of the person of the plaintiff in the proceedings in the United States District Court was not res judicata.

16. The trial court erred in holding as a matter of law that the question of jurisdiction of the subject matter of the proceeding in the United States District Court was not res judicata.

17. The trial court erred in holding as a matter of law that the question of the power of the United States District Court to enter the decree determining the rights of the plaintiff was not res judicata.

18. The trial court erred in holding as a matter of law that the question of the validity of the decree of the United States District Court was not res judicata.

19. The trial court erred in holding as a matter of law that the plaintiff was entitled to anything other than that [fol. 2-25] which is provided in the decree of the United States District Court.

And for other good and sufficient reasons appearing on the face of the record.

A. W. Froehde, Attorney for Defendant J. O. Stoll."

Notice to plaintiff of filing of written Motion for Judgment Notwithstanding the Verdict.

Notice to plaintiff of filing of written Motion for New Trial.

Notice of motion that written Motions for Judgment Notwithstanding the Verdict and For a New Trial be filed nunc pro tunc, June 22, 1936, and that said Motions be set for hearing.

Motion of defendant that the Motion, in writing, for a New Trial be filed nunc pro tunc as of June 22, 1936, sustained.

Notice of Appeal

To Leo Segall, Attorney for Plaintiff, 77 W. Washington Street, Chicago, Illinois:

Please Take Notice, that J. O. Stoll, defendant in the above-entitled cause, hereby appeals to the Appellate Court of Illinois, First District, from the judgment rendered and entered in this cause in the Municipal Court of Chicago, Illinois, on the 22nd day of June, A. D. 1936, against the defendant J. O. Stoll for One Thousand Five Hundred Eighty Three Dollars ($1,583.00) and costs.

[fol. 2-26] Said defendant prays that said judgment be reversed, and that judgment be entered in favor of this defendant and against the plaintiff for costs; or that said judgment be reversed and the defendant ordered to pay to the plaintiff the sum of Forty Five Dollars ($45.00) on account of interest and deliver fifteen (15) shares of capital stock of Olympic Hotel Building Corporation, an Illinois corporation, to the plaintiff, pursuant to the Plan of Reorganization confirmed in proceedings for corporate reorganization No. 56278, United States District Court for the Northern District of Illinois, Eastern Division, upon surrender of the bonds, interest coupons and guaranty sued upon by the plaintiff in this suit; or that said judgment be reversed and the defendant granted a new trial.

Dated at Chicago, Illinois this 11th day of July, A. D. 1936.

A. W. Froehde, Attorney for Defendant-Appellant.

Filed July 11, 1936.

Proof of Service of Notice of Appeal, July 11, 1936.

Præcipe for Trial Court Record. Receipt of attorney for plaintiff of a copy of Præcipe.

Order of Court fixing Appeal Bond at $1,750.00. Bond presented, approved, and ordered filed July 21, 1936.

Appeal bond.

Order that the original Report of Proceedings be used and incorporated in the Record on Appeal in lieu of a copy thereof.

[fol. 2-27]. REPORT OF PROCEEDINGS

Placita.

Plaintiff's Exhibits 1, 2 and 3 offered and received in evidence.

PLAINTIFF'S EXHIBITS 1, 2 AND 3

Plaintiff's Exhibits 1, 2 and 3, identical except as to numbers, consisting of three Five Hundred Dollars ($500.00) principal amount First Mortgage Gold Bonds due January 15, 1936, with interest thereon from the date thereof at the rate of six and one-half percent (6½%) per annum, payable semi-annually on the 15th day of January and July in each year on presentation and surrender of attached interest coupons as they severally become due, at the Cosmopolitan State Bank, executed by Ten Fifteen North Clark Building Corporation, a corporation, by S. A. Crowe, Jr., its President, and M. C. Stoll, its Secretary, bearing a rubber stamp endorsement:

"The time of payment of this bond and the rate of interest thereon has been changed in accordance with the terms of a certain agreement dated as of July 15, 1932."

with adjusted interest coupons numbered two (2) to ten (10) inclusive, maturing on January 15 and July 15 of each year beginning January 15, 1933, successively, respectively, and the following imprinted on the back of each bond:

"Guaranty

"For Value Received, the undersigned, Do Hereby Guarantee the payment of the within bond and the interest thereon, at the maturity thereof either by the terms of [fol. 2-28] said bond or of any agreement extending the time of payment thereof, or by anticipation of maturity at the election of the legal holder or owner thereof, in accordance with any provision of said bond or of the trust deed given to secure the same, or of any extension agreement; and do hereby absolutely guarantee the payment of the respective interest coupons, given to evidence the interest on said bond, and all extension coupons, at their respective dates of maturity, and all interest on said coupons, and do hereby ab-

solutely guarantee the full and complete performance by the maker of the trust deed given to secure the said bonds and coupons, and its successors and assigns, of all of the terms, provisions, covenants and agreements of the said trust deed and of any such extension agreement.

"And the undersigned do hereby waive all presentation for payment, notice of dishonor or nonpayment, protest, diligence in connection, notice of election to declare due, notice of default, and notice of execution of any extension agreement; and do hereby specifically covenant and agree that there shall be no obligation upon the holder or holders, owner or owners of the said bond or coupons, or either of them or of the indebtedness evidenced or secured thereby or by said trust deed, to first exhaust any remedy or remedies against the maker of said bond, coupons or trust deed, or its successors or assigns, or against any endorser or guarantor, before proceeding against these Guarantors, and do hereby agree that they shall not be discharged as a result of any [fol. 2-29] extension of time of payment or renewal or extension agreement or forbearance or modification of terms or tenor, which may be entered into or granted by any holder or owner of said bonds, coupons or trust deed.

In Witness Whereof, the undersigned, have hereunto set their hands and seals this 15th day of January, A. D. 1927.

J. O. Stoll (Seal.) S. A. Crowe, Jr. (Seal)."

Plaintiff rested. Defendant's Exhibits 1, 2, 3 and 4 offered and received in evidence.

DEFENDANT'S EXHIBIT 1

Notice to attorney for plaintiff to admit facts:

Take Notice that the defendant in this action, J. O. Stoll, requires the plaintiff to admit, for the purposes of this action only, in accordance with the Statute and Rules of Court in such case made and provided, the several facts respectively hereunder specified; within five (5) days from the service of this notice:

Those portions of said notice which were afterwards admitted, are as follows:

(1) That on June 20, 1934, Ten Fifteen North Clark Building Corporation filed its petition for reorganization

under Section 77-B of the Bankruptcy Act, as Amended, in the United States District Court for the Northern District of Illinois, Eastern Division, which petition was approved as properly filed on July 18, 1934, and that notice of said proceedings was given to the plaintiff herein by mail and publication; as shown by the record of proceedings for reorganization No. 56278 in the said Court;

[fol. 2-30] (2) That on September 25, 1934, the said Ten Fifteen North Clark Building Corporation filed its proposed Plan of Reorganization in the said proceedings, which Plan provided, amongst other things, that:

For each One Hundred Dollars ($100.00) principal amount of First Mortgage 6½% Gold Bonds outstanding, with unpaid interest coupons thereto pertaining, there shall be issued and delivered to the holder thereof by the Olympic Hotel Building Corporation, one (1) share of Common stock.

Unpaid interest due January 16, 1932, and prior thereto shall be paid in cash at the rate of six and one-half percent (6½%) per annum; unpaid interest due July 15, 1932, shall be paid in cash at the rate of five percent (5%) per annum; and to those bondholders who have not received an additional payment of three percent (3%) in lieu of interest due January 15, 1933, and July 15, 1933, there shall be paid in cash an amount equal to three percent (3%) of the principal amount of their bonds; and all claims of bondholders against Cosmopolitan State Bank, as Trustee, for principal and said interest paid to it by the Debtor and uncollected by such bondholders shall be transferred and assigned to the said Olympic Hotel Building Corporation by order of this court; all accumulated and unpaid interest due since July 15, 1933, shall be deemed waived and cancelled;

and also:

* * * the personal guaranty of J. O. Stoll and S. A. Crowe, Jr., of said First Mortgage 6½% Gold Bonds shall be cancelled and surrendered in consideration for the trans-
[fol. 2-31] fer of all the assets of said Debtor to the Olympic Hotel Building Corporation and the surrender of the said Common Stock of the Debtor.

All claims and rights of all stockholders and creditors of Ten Fifteen North Clark Building Corporation shall be, and

upon the confirmation of this plan, become discharged and cancelled and shall cease and terminate, and the only rights of such persons, by virtue of said claims, shall be those accruing to them in and through the securities to be issued to them as above provided.

(3) That notice of a hearing for the purpose of considering said Plan of Reorganization and any other plan of reorganization which might be proposed and the confirmation thereof, in said proceedings on November 5, 1934, was given to the plaintiff herein by mail and publication, and that the plaintiff herein filed no objections to said Plan of Reorganization, as shown by the record of said proceedings;

(4) That thereafter said Plan of Reorganization was accepted in writing by or on behalf of creditors holding more than two-thirds (⅔) in amount of the claims in each class and by stockholders of the said Ten Fifteen North Clark Building Corporation holding a majority of the capital stock of said corporation; and the United States District Court for the Northern District of Illinois, Eastern Division, on November 26, 1934, found:

That said Plan of Reorganization is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders and is feasible;

[fol. 2-32] That said Plan complies with the provisions of subdivision (b) of said Section 77-B, Bankruptcy Act;

That the offer of the Plan and its acceptance were in good faith and were not made or procured by any means or promises forbidden by the Bankruptcy Act;

and approved said Plan of Reorganization as having been filed in good faith, without collusion, and as being fair, equitable and feasible, and confirmed the said Plan of Reorganization, and ordered the Debtor through its officers and directors forthwith to execute and carry into effect the said Plan of Reorganization, as so confirmed; and further, that the provisions of the Plan and the order of confirmation shall be and are binding upon the (1) Debtor, (2) all stockholders thereof, including those who have not, as well as those who have, accepted it, and (3) all creditors, secured or unsecured, whether or not affected by the Plan, and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well

as those who have, accepted; as shown by the record of said proceedings;

(5) that a Final Decree has been entered in said proceedings in the said United States District Court, and the said estate has been closed;

(6) The plaintiff by an agreement, dated as of the 15th day of July, A. D. 1932, extended the time of maturity of the said bonds to become due and payable January 15, 1937, as will more fully appear by the said agreement recorded [fol. 2-33] in the Recorder's Office of Cook County, Illinois, on December 15, 1932, as document No. 11175855, Book 30419, Page 434;

(8) That said bonds and interest coupons attached thereto are secured by that certain trust deed dated January 15, 1927, recorded in the Recorder's Office of Cook County, Illinois, as document No. 9533309 in Book 24017, on Page 247, and that said trust deed provides, amongst other things, as follows:

"The exclusive right of action hereunder shall be vested in the trustee until refusal on its part to act, and no bondholder shall be entitled to enforce these presents in any proceeding in law or in equity until after demand has been made upon the trustee accompanied by tender of indemnity as aforesaid, and the trustee has refused or failed for 60 days thereafter to act in accordance with such demand."

Dated: Monday, the 17th day of February, A. D. 1936.

A. W. Froehde, Attorney for the Defendant, J. O. Stoll.

Received a copy of the foregoing notice this 17th day of February, A. D. 1936.

Leo Segall, Attorney for Plaintiff.

Filed 1936, Mar 17, A. M., 10:42. The Municipal Court of Chicago. Richard Frohlich, Clerk.

[fol. 2-34] DEFENDANT'S EXHIBIT 2

Admission of Facts

Pursuant to the notice to admit facts served upon the plaintiff herein on the 17th day of February, A. D. 1936,

the plaintiff herein, by his respective counsel, admits, for the purpose of this action only if relevant, the following paragraphs in said notice:

(1) Paragraphs (1), (2), (3), (4);

(2) In paragraph (5) the following fact only, "That a Final Decree has been entered in said proceedings in the said United States District Court, and the said estate has been closed;"

(3) Paragraphs (6) and (8).

Samuel M. Bloomberg, Attorney for Plaintiff.

Receipt for copy.

DEFENDANT'S EXHIBIT 3

Certified copy of Decree of the United States District Court for the Northern District of Illinois, Eastern Division, filed herein on April 17, 1936, as follows, amongst other things:

[fol. 2-35] "IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Proceedings for Reorganization

No. 56278

In the Matter of TEN FIFTEEN NORTH CLARK BUILDING CORPORATION, Debtor

Confirmation of Plan of Reorganization

"This cause coming on to be heard upon the petition of the Debtor heretofore filed herein on September 25th, 1934, for an order setting the time for a hearing for consideration and confirmation of the Plan of Reorganization filed by the Debtor, or any other Plan of Reorganization which might be properly proposed, the report of Edmund D. Adcock, Referee in Bankruptcy, as Special Master, on the Plan of Reorganization and the petition of the Debtor filed herewith for confirmation of said Plan of Reorganization, and the Court having considered the said Report, said

petition for confirmation of the said Plan of Reorganization, and it appearing to the Court:

1. That the Debtor did, on June 20th, 1934, file its petition for reorganization pursuant to the provisions of Section 77-B of an Act to Establish a Uniform System of Bank-
[fol. 2-36] ruptcy throughout the United States, approved July 1st, 1898 and Acts Amendatory thereof, and the debtor herein, having thereafter on, to-wit: July 18th, A. D. 1934, shown to the Hon. William H. Holly, one of the judges of the United States District Court for the Northern District of Illinois, Eastern Division, that the said petition was properly filed under said Section 77-B, an order was then and there entered approving the said petition of the Debtor herein as properly filed.

2. That, thereafter, on, to-wit: July 23rd, 1934, an order was entered in these proceedings authorizing the Debtor herein to remain in temporary possession of its estate, and August 15th, 1934, was set as the time for a hearing on the question whether or not the Debtor herein should be continued in possession of its estate; and on August 15th, 1934, pursuant to proper notice by publication and mailing to all the known creditors and stockholders of the Debtor herein, as shown by a list filed herein by the Debtor, an order was entered herein ratifying and confirming the said order of July 23rd, 1934, continuing the Debtor in possession of its estate.

3. Thereafter, the Debtor herein, on September 18th, 1934, filed a balance sheet as shown by its books as of June 20th, 1934, together with a statement of its receipts and disbursements from June 20th, 1934, to August 31st, 1934, and on October 16th, 1934, filed its report of receipts and disbursements for the month of September 1934, and on November 19th, 1934, filed its statement of receipts and disbursements for the month of October, 1934.

[fol. 2-37] 4. On September 25th, 1934, the Debtor herein filed its proposed Plan of Reorganization and it was ordered that a hearing be held on November 5th, 1934, for the purpose of considering the said Plan of Reorganization and any other Plan of Reorganization which might be properly proposed, and the confirmation thereof, and notice thereof to be given to creditors and stockholders of and claimants

against the Debtor herein by publication and mailing, which hearing might be continued from time to time by order of the judge, without mailing or publication of further notice.

5. On September 25th, 1934, an order was entered dividing creditors and stockholders into classes, according to the nature of their respective claims and interest, and October 30th, 1934, was fixed as the date after which no claim or interest might participate in any Plan of Reorganization, except on order for cause shown.

6. On November 5th, 1934, pursuant to notice to all known creditors and stockholders by publication and mailing, the hearing for the purpose of considering the Plan of Reorganization filed herein by the Debtor, and the confirmation thereof was held, said Plan of Reorganization was referred to the Honorable Edmund D. Adcock, Referee in Bankruptcy as Special Master for consideration and report, and said hearing was continued to November 26th, 1934.

7. On November 21st, 1934, the said Hon. Edmund D. Adcock, Referee in Bankruptcy as Special Master, filed his report finding:

a. The Plan is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders and is feasible.

[fol. 2-38] b. It complies with the provisions of subdivision (b) Section 77-B of the Bankruptcy Act,

c. The Plan provides that it shall not become effective until it is accepted by the required creditors of each class and by the stockholders of the Debtor, as required by subdivision (e), clause (1) of Section 77-B of the Bankruptcy Act,

d. The Plan complies also with subdivision (e), clause (2) of the Bankruptcy Act,

. . . . . .

f. It appears that the Plan presented is in good faith and has not been made or procured by any means or promises forbidden by the Bankruptcy Act.

. . . . . .

h. The Plan also provides that it may be modified or amended as permitted by Section 77B of said Act

and recommending that an order be entered approving said Plan of Reorganization.

"And the court being fully advised in the premises, finds:

A. That the Debtor was on June 20th, 1934, and thereafter, and now is, unable to meet its debts as they mature and to liquidate its obligations, and unless it is granted relief by this court great loss will occur to its creditors and stockholders.

B. That the Plan of Reorganization filed herein by the Debtor has been accepted in writing by or on behalf of creditors holding more than two-thirds in amount of the [fol. 2-39] claims in class 1, as heretofore fixed by order of this court, and more than a majority of claims in Class 3, based upon the capital stock of the Debtor; that no claims have been filed under Class 5, and claims in Class 4 for reasonable expenses and allowance of this proceeding are to be approved by the court.

C. That no objections have been made to the Plan of Reorganization filed herein by the Debtor and no other Plan of Reorganization has been proposed.

. . . . . .

E. That the said Plan of Reorganization is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders and is feasible.

F. That said Plan complies with the provisions of subdivision (b) of said Section 77B.

. . . . . .

I. That the offer of the Plan and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by the Bankruptcy Act, and

J. The Debtor is authorized and the new corporation to which all the assets of the Debtor are to be transferred shall be authorized to take all action necessary to carry out the plan.

"It is Therefore Ordered and Decreed:

That the report of Edmund D. Adcock, Referee in Bankruptcy, as Special Master, be, and the same is hereby approved.

. . . . . .

[fol. 2-40] That the Plan of Reorganization heretofore filed herein be, and the same is hereby approved as having been filed in good faith without collusion, and as being fair, equitable and feasible, and that the same be, and hereby is confirmed upon filing acceptance in writing by or on behalf of creditors holding more than two-thirds in amount of the claims in Class 2.

That the Debtor, through its officers and directors, proceed forthwith to execute and carry into effect the said Plan of Reorganization as so confirmed, including the transfer of all of its assets, to the new corporation, to be organized, and otherwise performing and carrying out and causing to be performed and carried out all of the acts and transactions on its part required to be performed and carried out, pursuant to said Plan of Reorganization.

. . . . . .

That the provisions of the Plan and this order of confirmation shall be, and are binding upon the (1) Debtor, (2) all stockholders thereof, including those who have not, as well as those who have, accepted it, and (3) all creditors, secured or unsecured, whether or not affected by the Plan, and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have, accepted.

Enter:

William H. Holly, Judge."

November 26, 1934.

[fol. 2-41] Certificate of Clerk of United States District Court, Northern District of Illinois, Eastern Division, that the foregoing is a full and true copy of the original order entered November 26th, 1934, and that the said order is in full force and effect.

DEFENDANT'S EXHIBIT 4

Part 1, Petition of plaintiff in the District Court of the United States for the Northern District of Illinois, Eastern Division.

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Proceedings for Reorganization

No. 56278

In the Matter of TEN FIFTEEN NORTH CLARK BUILDING CORPORATION, Debtor,

Petition to Vacate or Modify Final Decree and Order Confirming Plan of Reorganization

Your petitioner, William Gottlieb, respectfully represents unto this Honorable Court, as follows:

1. That he is the holder and owner of undeposited bonds Nos. 250, 251 and 260 in the sum of Five Hundred Dollars ($500.00) each, and coupons attached thereto; that said bonds are the indebtedness of the Ten Fifteen North Clark Building Corporation, the debtor herein, by whom the petition for corporate reorganization has been filed; that said bonds are [fol. 2-42] secured by a Trust Deed No. 9533309, which said Trust Deed is recorded in the office of the Recorder of the County of Cook and State of Illinois.

2. That the petition for corporate reorganization heretofore filed has been approved as having been filed in good faith, and that pursuant thereto, the debtor filed its plan for reorganization as provided by Sections 77A and 77B of an Act entitled 'An Act to Establish a Uniform System of Bankruptcy throughout the U. S.' adopted July 1, 1898, and Acts amendatory thereof and supplemental thereto, which plan has neither been approved nor accepted by this petitioner.

3. That on November 26, 1934, an order was entered by this Honorable Court, confirming the Plan of Reorganization heretofore filed by the debtor, which said Plan of Reorganization provided, inter alia, that 'The personal guar-

anty by J. O. Stoll and S. A. Crowe, Jr., of said First Mortgage six and one-half (6½%) per cent Gold Bonds shall be cancelled and surrendered.'

4. That your petitioner was neither personally served with a subpœna to appear in these proceedings, nor has this petitioner voluntarily appeared at any time for the purpose of giving this court jurisdiction over his person, nor has he appeared for any other purpose.

5. That your petitioner, has certain rights and remedies as will appear hereafter arising out of, and by virtue of the ownership of said bonds and the said personal guaranty of J. O. Stoll and S. A. Crowe, Jr. thereto; that your [fol. 2-43] petitioner believes that this Honorable Court does not have and did not have the power and jurisdiction to deprive your petitioner of said rights and remedies by virtue of any power conferred upon it by Section 77A and Section 77B, of the Act aforementioned, especially as to that power or jurisdiction to cancel the said guaranty; and that said rights and remedies with respect to the guaranty aforesaid cannot be determined or affected by any Plan of Reorganization filed pursuant to the sections aforesaid.

6. That your petitioner is informed and believes and upon such information and belief alleges that the guarantors of said bonds are responsible persons and financially able to pay the indebtedness represented by such bonds, and that your petitioner will be deprived of his lawful rights to pursue such remedies as he may have for the purpose of enforcing and collecting such claims as exist by virtue of said bonds and the guaranty thereof.

Wherefore, your petitioner prays that an order may be entered vacating or modifying the decree heretofore entered herein on November 20, 1935, and the order confirming the plan of reorganization heretofore entered herein on November 20, 1934, and for such other relief as may seem meet and equitable unto this Honorable Court.

William Gottlieb, Petitioner.

Verification.
Jurat."

DEFENDANT'S EXHIBIT 4, PART 2: ANSWER TO PETITION OF PLAINTIFF

[fol. 2-44] "IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Proceedings for Corporate Reorganization

No. 56278

In the Matter of TEN FIFTEEN NORTH CLARK BUILDING CORPORATION, Debtor

Answer of Debtor to Petition of William Gottlieb

Now comes Ten Fifteen North Clark Building Corporation, by J. O. Stoll, Treasurer, and for answer to the petition of William Gottlieb, filed herein on May 14, 1936, says:

1. That on June 20, 1934, it filed its petition for reorganization under Section 77-B of the Bankruptcy Act, as Amended, in the United States District Court for the Northern District of Illinois, Eastern Division, which petition was approved as properly filed on July 18, 1934.

2. Pursuant to and in compliance with an order of said Court, on July 26, 1934 it caused a notice to be mailed to the said William Gottlieb of the pendency of said proceedings under said Section 77-B and of a hearing to be held before one of the Judges of the said United States District Court on the question of continuing the Debtor in possession [fol. 2-45] of its Estate or the appointment of a Trustee in Bankruptcy, and also caused publication of said notice to be made on the 26th day of July, A. D. 1934 and on the 2nd day of August, A. D. 1934; all of which will more fully appear from proof of service and publication of notice filed herein.

3. That on September 25, 1934, the Debtor herein filed its Proposed Plan of Reorganization, which plan provided, amongst other things, that:

'For each One Hundred Dollars ($100.00) principal amount of First Mortgage 6½% Gold Bonds outstanding, with unpaid interest coupons thereto pertaining, there

shall be issued and delivered to the holder thereof, by the Olympic Hotel Building Corporation, one (1) share of Common Stock.'

and also:

'• • • the personal guaranty by J. O. Stoll and S. A. Crowe, Jr., of said First Mortgage 6½% Gold Bonds shall be cancelled and surrendered in consideration for the transfer of all the assets of said Debtor to the Olympic Hotel Building Corporation and the surrender of the said Common Stock of the Debtor.'

4. That pursuant to and in compliance with an order of said Court, the Debtor herein on October 13, 1934, caused a notice to be mailed to the said William Gottlieb that the date of November 5, 1934, at 10:00 o'clock in the forenoon, before the Honorable William H. Holly, Judge of the United States District Court, or in his absence before any other Judge who may be sitting in his stead at the United States Courthouse, Chicago, Illinois, had been set for the time for a hearing for the purpose of considering the said Plan [fol. 2-46] of Reorganization filed herein by the Debtor and any other plan of reorganization which might be properly proposed, and the confirmation thereof, which hearing might be continued from time to time by order of the Judge without mailing or publication of further notice; and also caused said notice to be published on the 26th day of September, A. D. 1934 and on the 3rd day of October, A. D. 1934, and mailed with said notice a copy of said Plan of Reorganization, a letter from the Debtor explaining said Plan of Reorganization including the cancellation of the guaranty; all of which will more fully appear from proof of service and publication of notice filed herein.

5. That S. A. Crowe, Jr., one of the individual guarantors of the said bonds issued by the Debtor, was the owner of three hundred forty-nine (349) shares of the capital stock of the Debtor; that J. O. Stoll, the other individual guarantor of the said bonds issued by the Debtor, was the owner of one (1) share of the said capital stock of the Debtor; that Margaret C. Stoll, the wife of J. O. Stoll, was the owner of two (2) shares of the said capital stock; and Herman X. Stoll, brother of J. O. Stoll, was the owner of three hundred forty-eight (348) shares of said capital stock, and the said

S. A. Crowe, Jr., and J. O. Stoll, and Margaret C. Stoll, and Herman X. Stoll, were all of the stockholders of the Debtor. Said stockholders and creditors holding more than two-thirds (⅔) in amount of the claims in each class, filed their acceptances in writing of said Plan of Reorganization.

6. On November 5, 1934, at the time and place fixed for a hearing on the said Plan of Reorganization, the said Wil-
[fol. 2-47] liam Gottlieb did not appear and did not make any objections to said Plan of Reorganization, nor did anyone appear or object for him. Upon motion of the Debtor, the said Plan of Reorganization was referred to the Honorable Edmund D. Adcock, Referee in Bankruptcy, as Special Master, for consideration and report, and said hearing was continued to November 26, 1934.

7. That on November 21, 1934, said Honorable Edmund D. Adcock, as Special Master, filed his report, finding, amongst other things:

'The plan is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders and is feasible.

'It complies with the provisions of subdivision (b), Section 77-B of the Bankruptcy Act.

'It appears that the Plan presented is in good faith and has not been made or procured by any means or promises forbidden by the Bankruptcy Act.'

8. On November 26, 1934, this Court entered an order approving the Report of Honorable Edmund D. Adcock, as Special Master, and confirming said Plan of Reorganization, and finding, amongst other things:

'That the Debtor was, on June 20th, 1934, and thereafter, and now is, unable to meet its debts as they mature and to liquidate its obligations, and unless it is granted relief by this court great loss will occur to its creditors and stockholders.

'That no objections have been made to the Plan of Reorganization filed herein by the Debtor and no other Plan of Reorganization has been proposed.

[fol. 2-48] 'That the said Plan of Reorganization is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders and is feasible.

'That said Plan complies with the provisions of subdivision (b) of said Section 77-B.

'That the offer of the Plan and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by the Bankruptcy Act.'

and ordering said Plan to be executed and carried into effect.

9. Thereafter, all of the assets of the Debtor were transferred to the Olympic Hotel Building Corporation, and the Common stock of the Debtor was surrendered.

10. On January 12, 1935, Debtor caused notice to be mailed to the said William Gottlieb of a hearing on January 21, 1935, before the Honorable Edmund D. Adcock, as Special Master, of a hearing of any objections that might be made to allowance of amounts claimed for costs, expenses and fees, and also caused publication of said notice on January 11, 1935, and January 18, 1935; as will more fully appear by proof of service by publication and mailing filed herein.

11. On February 11, 1935, the Debtor mailed a letter to the said William Gottlieb, informing him that the said Plan of Reorganization had been confirmed, that the new corporation had been organized, the property of the Debtor conveyed to it, all the stock of the new corporation issued to [fol. 2-49] the old corporation for distribution, and the Seventy Thousand Dollars ($70,000.00) par value stock of the Debtor had been surrendered.

12. On March 5, 1935, creditors, of the same class as William Gottlieb, filed written objections to the cancellation of the said guaranty of J. O. Stoll and S. A. Crowe, in consideration for the transfer of all of the assets of the Debtor to a new corporation and the surrender of the common stock of the Debtor, and asked that said order of confirmation be vacated and set aside, and for such other relief as might be proper in the premises, which objections were referred to Honorable Edmund D. Adcock, as Special Master, to take evidence and make his report and recommendations; and said Special Master received evidence, heard testimony and the arguments of counsel, and recommended that the objections be overruled.

13. This Court, pursuant to said recommendations and report, entered an order overruling said objections and

again confirming said Plan of Reorganization, with slight modifications.

14. On the 16th day of May, A. D. 1935, a notice of a meeting of stockholders of Olympic Hotel Building Corporation to be held on the 27th day of May, A. D. 1936, for the election of directors, for the amendment of By-Laws and for such other business as might properly come before the meeting, was mailed to the said William Gottlieb.

15. On the 7th day of June, A. D. 1935, a notice was mailed to the said William Gottlieb of the continuation of the said stockholders' meeting called for May 27, 1935.

[fol. 2-50] 16. That on February 22, 1935, July 29, 1935, and October 15, 1935, letters were mailed to the said William Gottlieb, advising him of the confirmation of said Plan of Reorganization, and requesting him to surrender his bonds for stock in Olympic Hotel Building Corporation.

17. That holders of bonds in the aggregate amount of Two Hundred Seven Thousand Seven Hundred Dollars ($207,700.00), equal to ninety-six and fifty-one one-hundredths percent (96.51%) of the total bonds of the Debtor outstanding, have surrendered and cancelled their bonds and guaranty held by them and accepted stock in lieu thereof, pursuant to said Plan of Reorganization.

18. That a Final Decree has been entered in these proceedings closing this Estate, which decree remains in full force and effect.

The Debtor respectfully submits to the Court (1) that said petitioner, William Gottlieb, is guilty of laches in that he had full notice of all proceedings in this cause and has failed and neglected to object to said Plan of Reorganization, the confirmation thereof, and the carrying out of said Plan; and (2) that said William Gottlieb is estopped by said proceedings from again adjudicating the same facts and issues.

Wherefore the Debtor respectfully prays that the petition of William Gottlieb be denied.

Ten Fifteen North Clark Building Corporation, by
J. O. Stoll, Treasurer.

Verification.
Jurat."

DEFENDANT'S EXHIBIT 4, PART 3: ORDER

[fol. 2-51] "IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Proceedings for Reorganization

No. 56278

In the Matter of TEN FIFTEEN NORTH CLARK BUILDING CORPORATION, Debtor

Order

At Chicago, Illinois, this 20th day of May, A. D. 1936, this cause came on to be heard upon the petition of William Gottlieb filed herein on May 14, 1936, and the Answer of the Debtor herein, filed herein on May 19, 1936; and the Court having considered the same, and having heard the arguments of counsel for the petitioner and the Debtor;

It Is Ordered:

That the said Petition of William Gottlieb for an order vacating or modifying the decrees heretofore entered herein confirming the Plan of Reorganization heretofore filed herein be and is hereby denied.

Enter:

William H. Holly, Judge."

[fol. 2-52] DEFENDANT'S EXHIBIT 4, PART 4

Certificate of Clerk of United States District Court, Northern District of Illinois, that the foregoing is a true and full copy of the original petition filed May 14, 1936. Answer filed May 19, 1936, and Order entered May 25, 1936, and that no petition for appeal has been filed or presented to the Court, and that the above order is in full force and effect.

The defendant rested. Which was all the evidence offered or received on the trial of the said cause. The Plaintiff's opening argument. Defendant's closing argument. Adjournment until June 22, 1936.

FINDING AND JUDGMENT, ETC.

Reconvened pursuant to adjournment. Plaintiff's closing argument. The Court found the issues against the defend-

ant, J. O. Stoll. Motion for a new trial overruled. Exception. Motion in arrest of judgment overruled. Exception. Judgment against the defendant, J. O. Stoll, for $1,583.00 and costs. Written motion for judgment notwithstanding the verdict and for a new trial and proof of service thereof, filed. Written motion for a new trial overruled. Exception. July 11, 1936, Notice of Appeal filed. July 13, 1936, proof of service of Notice of Appeal filed. July 15, 1936, Præcipe for Record and proof of service thereof filed. July 21, 1936, Appeal Bond fixed at $1,750.00, presented, approved, and ordered filed. Which were all the proceedings had on the trial of the above entitled cause.

ORDER APPROVING REPORT OF PROCEEDINGS

Certificate of trial judge approving Report of Proceedings dated September 9th, 1936, signed by John J. Rooney, Judge of the Municipal Court of Chicago. Certificate of Trial Court dated August 12, 1936, certifying Report of Pro-
[fols. 2-53-54] ceedings was presented to him on that date. Report of proceedings approved by Samuel M. Bloomberg and Leo Segall, Counsel for Plaintiff., Stamp: "Filed The Municipal Court of Chicago Sep—9 1936 Richard Frohlich, Clerk."

CLERK'S CERTIFICATE

Certificate of Richard Frohlich, Clerk of The Municipal Court of Chicago, that the foregoing is a full, true and perfect transcript of the Record in the above entitled cause.

Respectfully submitted, Albert W. Froehde, Attorney for Appellant.

[fol. 2-55] IN SUPREME COURT OF ILLINOIS

Abstract of Appellate Court Record—Filed May 8, 1937.

Placita, February term, 1937.

Placita, December term, 1936.

Order entered January 4, 1937, by Appellate Court taking cause under advisement on briefs filed.

JUDGMENT

Order entered April 5, 1937, by Appellate Court that judgment of Municipal Court of Chicago be reversed, and that appellant recover of and from appellee its costs, and that he have execution therefor. From which order and judgment Mr. Presiding Justice Matchett dissents.

ORDER DENYING PETITION FOR REHEARING

Order entered on April 19, 1937, by Appellate Court denying petition of appellee for a rehearing in said cause.

Order entered April 19, 1937, by Appellate Court that the written decision filed April 5, 1937, be published in full.

ORDER DENYING MOTION FOR CERTIFICATE OF IMPORTANCE, ETC.

Order entered April 23, 1937, by Appellate Court denying appellee's motion for a Certificate of Importance and an appeal to the Supreme Court.

CERTIFICATE AS TO AMOUNT INVOLVED

Certificate issued on April 26, 1937, by Appellate Court that more than Fifteen Hundred Dollars ($1,500.00) is fairly involved in the claim of William Gottlieb, appellee herein.

ORDER STAYING MANDATE

Order entered April 26, 1937, by Appellate Court staying the issuance of the mandate in this cause until time for filing of a petition for leave to appeal in the Supreme Court shall have expired and if filed within the proper time, then until said petition shall have been granted or refused.

[fol. 2-56] CLERK'S CERTIFICATE

Certificate of Clerk of Appellate Court for First District of Illinois that foregoing is a true copy of final order and

judgment and all other proceedings of said Appellate Court in said cause.

Samuel M. Bloomberg, Leo Segall, Attorneys for Petitioner. Samuel M. Bloomberg, of Counsel.

[fol. 3] [File endorsement omitted]

[fol. 3-1] In Supreme Court of Illinois, June Term, A. D. 1937

William Gottlieb, Petitioner,

vs.

S. A. Crowe, Jr., and J. O. Stoll (Defendants), J. O. Stoll, Respondent

Petition for Leave to Appeal from Appellate Court of Illinois, First District

There Heard on Appeal from the Municipal Court of Chicago

Honorable John J. Rooney, Trial Judge

Petition for Leave to Appeal—Filed May 8, 1937

To the Honorable Justices of the Supreme Court of Illinois:

Now comes the petitioner, William Gottlieb, plaintiff in the trial court and appellee in the Appellate Court and petition this Honorable Court for leave to appeal in the above-entitled cause, and respectfully shows the following:

Opinion of the Appellate Court

Mr. Justice O'Connor delivered the opinion of the Court:

Plaintiff brought an action to recover the face value of three bonds of $500 each, with interest thereon, against [fol. 3-2] the defendants on their guaranty to pay the bonds. Crowe was not served with process and did not enter his appearance. Stoll will hereinafter be referred to as the defendant. There was a trial before the court without a jury, and a finding and judgment in plaintiff's favor for $1,583, the amount of his claim, and defendant appeals.

The record discloses that January 15, 1927, the "Ten Fifteen North Clark Building Corporation" issued its construction bonds aggregating $250,000. Some years afterward the building corporation was financially embarrassed and filed its proceeding in the District Court of the United States for the Northern District of Illinois, Eastern Division, under 77-B of the Bankruptcy Act, as amended. November 26, 1934, the United States District Court entered a decree confirming a plan of reorganization of the property. The decree finds the plan for reorganization filed by the debtor had been referred to Referee Adcock, as Special Master; that the court considered the report of the Master and the petition for confirmation of the plan and finds that the petition of the debtor was filed June 20, 1934, pursuant to the provisions of Section 77-B of the Bankruptcy Act; that September 25, 1934, the debtor filed its proposed plan for reorganization and a hearing thereon was set for November 5, 1934, and notice given to all creditors and stockholders of the debtor by publication any by mail; that thereafter the plan was referred to Special Master Adcock and after a hearing he made his report on November 21, 1934, in which it was found that the plan was fair and equitable; that "It complies with the provisions of subdivision (b) Section 77-B of the Bankruptcy Act"; that the plan provided it should not become effective until accepted by the required number of creditors; that the plan was presented in good faith.

[fol. 3-3] The court further found that on June 20, 1934, and thereafter the debtor was unable to meet its debts as they matured and unless relief were granted by the court great loss would occur to its creditors and stockholders; that the plan for reorganization had been accepted in writing by more than two-thirds of a certain class of its creditors and more than a majority of another class of creditors; that no objections were made to the plan, and it was ordered and decreed that the report of the Referee Adcock, as Special Master, be approved; that the plan and order of confirmation be binding upon the debtor, all stockholders and "all creditors, secured or unsecured, whether or not affected by the Plan, and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have, accepted." The plan provided for the reorganization of a

new corporation and that for each $100 of first mortgage bonds issued by the debtor there be issued to the owners one share of common stock in the new corporation known as the Olympic Hotel Building Corporation; and the plan further provided for the payment of certain overdue interest to the bondholders, and that "the personal guaranty of J. O. Stoll and S. A. Crowe, Jr., of said First Mortgage 6½% Gold Bonds shall be cancelled and surrendered in consideration of the transfer of all the assets of said Debtor to the Olympic Hotel Building Corporation and the surrender of the said Common Stock of the Debtor"; and that all claims and rights of stockholders and creditors of the debtor upon the confirmation of the plan be discharged and cancelled and the only rights of such stockholders and creditors shall be those accruing to them in and through the securities to be issued by the new corporation. It further appears that notice of the hearing for the purpose of considering the [fol. 3-4] plan was given to plaintiff; that after the plan was approved it was fully carried out and bonds aggregating $206,000, which was 96% of the total bonds outstanding, had been surrendered and cancelled.

It further appears that creditors of the same class as plaintiff in the instant case, filed written objections to the cancellation of the guaranty of the defendant and moved that the confirmation of the plan, as approved by the District Court, be vacated. The objections were referred to a Special Master to take evidence and make up his report and recommendation. The Master heard the evidence and recommended that the objections be overruled and the court followed the recommendations of the Master. All of the assets of the debtor have been transferred to the new corporation, the Olympic Hotel Building Corporation.

Plaintiff did not appear in the proceedings in the District Court, but during the pendency of the instant case in the Municipal Court of Chicago he filed his verified petition in the District Court, in which he set up the ownership of the three bonds of $500 each and that he had not approved or accepted the plan of reorganization theretofore confirmed by the District Court, and averred that the District Court did not have the power to cancel the written guaranty of the defendant. And the prayer was that the District Court enter an order vacating or modifying the decree so as to eliminate the cancellation of the guaranty. The debtor filed

a verified answer to the petition in the District Court, in which it set up what had been done in that court, including the cancellation of the guaranty, and that plaintiff had been given a number of notices of the several hearings of the matters pending in the District Court. The District Court considered the petition and the answer and entered an order [fol. 3-5] again refusing to modify the decree of the District Court approving the plan of reorganization.

Counsel for plaintiff contend that the District Court was without authority to cancel the guaranty and therefore the judgment of that court is not res adjudicata. This District Court expressly found that the debtor had complied with all the provisions of Section 77-B of the Bankruptcy Act and construed the Bankruptcy Law as authorizing the cancellation of the guaranty. That court on two occasions expressly passed on this question, viz., when creditors of the same class raised the question as above stated, and afterward when plaintiff in the instant case again raised the question. The question was there squarely put in issue and if plaintiff or the other creditors were dissatisfied with the decision of the District Judge they should have appealed from his decision to the United States Circuit Court of Appeals, where they probably would have obtained relief. In Re Diversey Bldg. Corporation, 86 Fed. (2d) 456. Plaintiff cannot now complain. Chamblin v. Chamblin, 362 Ill. 588.

In this state of the record, we would not be warranted in disturbing the judgment of the District Court in this collateral proceeding unless it was clear that the District Court was wholly without jurisdiction, and this we are unable to say.

For the reasons stated the judgment of the Municipal Court of Chicago is reversed.

Judgment Reversed.

McSurely, J., concurs.

DISSENTING OPINION

MATCHETT, P. J., dissenting:

Under the decision in In Re Diversey Bldg. Corporation, cited in the opinion, the Federal Court was wholly without jurisdiction of the subject matter of this guaranty and its order therefore void.

[fol. 3-6] POINTS RELIED UPON FOR REVERSAL OF THE JUDGMENT OF THE APPELLATE COURT AND AUTHORITIES AND SUGGESTIONS IN SUPPORT THEREOF.

I

The Bankruptcy Act prohibits the concellation of a guaranty and there is no authority in Section 77B of that act as amended or elsewhere giving the Federal Court, while sitting in bankruptcy under Section 77B for reorganizing a "debtor" corporation, power and jurisdiction to cancel a guaranty.

A. The Pertinent Statutes and cases in point:

Section 16 (a) of the Bankruptcy Act prohibits and Section 77B does not authorize, alteration of rights against third party guarantors. Section 16 (a) provides that:

"The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

Section 77B (b) provides that:

"A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, * * * (10) may deal with *all or any part of the property of the debtor and* may include any other appropriate provisions not inconsistent with this section."

The rights of creditors here referred to are rights against the debtor in reorganization, not rights against parties other [fol. 3-7] than such debtor. The property to be dealt with is the property of the debtor in reorganization, not property of parties other than such debtor. Section 77B (h) provides that "the final decree shall discharge the debtor from its debts and liabilities * * *". Clearly the only debts that may be discharged are debts of the debtor in reorganization, not debts of parties other than such debtor. Section 77B (k) provides that all other provisions of the Bankruptcy Act not inconsistent with Section 77B shall apply thereto, and Section 77B (o) provides that jurisdiction under 77B shall be the same as that which results from a voluntary petition and adjudication in bankruptcy.

It thus appears that Section 77B does not contain any provisions that might authorize alteration of rights against third party guarantors, which rights are expressly preserved in Section 16(a). Indeed, Section 77B, which relates to corporate debtors exclusively, does not even contain provisions analogous to Section 76, which, in relation to individual debtors, extends the obligation of the guarantor to correspond to the extension granted to the individual debtor liable for the debt guaranteed. Section 76 merely extends the guaranty but does not cancel it which the District Court had no power to do in the case at bar. Section 76 of the Bankruptcy Act relative to the extension of the guaranty does not apply to Section 77B proceedings and has no relation to any situation that may be created under them. In re Hygrade Dye Works, Inc., C. C. H. Dec., Sec. 3083 (no off. cit.).

Nor is Section 77B inconsistent with Section 16(a). The additional jurisdiction "for the relief of debtors" to be exercised under Section 77B, and conferred by Section 77A, is limited to the relief of debtors in reorganization. It does not extend to the relief of a guarantor of obligations of such a debtor, or to the relief of a guaranty of obliga- [fol. 3-8] tions upon which he is primarily and personally liable. Accordingly, Section 77B, which does not purport to affect rights against third party guarantors not in reorganization, cannot be inconsistent with Section 16(a) which preserves such rights. Both sections can and should be given full effect. Repeals by implication are not favored. Frost v. Wenie, 157 U. S. 46, 58; United States v. Jefferson Electric Mfg. Co., 291 U. S. 386, 396; General Motors, etc., Corp. v. United States, 286 U. S. 49, 61; Continental Bank v. Rock Island Ry., 294 U. S. 648, 670, 672.

There is nothing in the record to show that the District Court did indicate any provision in Section 77B upon which its jurisdiction and power to cancel the guaranty might be based. There is none. The District Court had no power to enter the decree cancelling the guaranty which did nullify Section 16(a). Ginsberg & Sons v. Popkin, 285 U. S. 204. Congress did not give the power and this is apparent by its silence. It is even true that Section 77B does not even give jurisdiction to the District Court over property of the bankrupt which it holds in trust for a third party. In re Commonwealth Bond Corp., Debtor, 77 Fed. (2d) 308.

B. House of Representatives' Bill No. 11917:

The present limitation of Section 77B, respecting destruction or alteration of rights against third party guarantors, are indicated in H. R. 11917. It was proposed to discharge a guarantor from his obligations upon discharge of a debtor from the obligations guaranteed, and to extend or reduce the obligations of a guarantor to correspond to any extension or reduction granted to the debtor liable on the debt guaranteed. The proposal of such amendments [fol. 3-9] to Section 77B clearly indicates that the powers sought to be granted thereby do not exist under Section 77B in its present form and that a complete discharge of the guarantor is not contemplated."

C. The Constitutional Question:

The constitutional question involved in the extension of Section 77B jurisdiction beyond property of the debtor has been noted by the court in In re Commonwealth Bond Corporation, 77 Fed. (2d) 308, 309. If Section 77B may be so construed as to empower the District Court to cancel the Guaranty, it would violate the Fifth Amendment which provides: "* * * nor shall any person * * * be deprived of * * * property without due process of law."

Louisville, etc. Bank v. Radford, 295 U. S. 555, 589, 601.

D. The District Court sitting in bankruptcy under Section 77B of the Bankruptcy Act for reorganizing a "debtor" corporation was a court of limited jurisdiction and power:

1. A Federal Court cannot have the power to enter a decree except when authority is found in the Constitution of the United States and statutes made pursuant thereto. The People v. Seelye, 146 Ill. 189, 221; State of Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 720; Munroe v. People, 102 Ill. 406, 409.

The test in determining whether the District Court had the power to cancel the guaranty is whether that court, under any circumstances, would have authority to enter such decrees and orders cancelling the guaranty. O'Connor v. Board of Trustees, 247 Ill. 54, 57. It is obvious that under Section 16 (a) of the Bankruptcy Act, it had no such

authority; there is no authority in Section 77B, nor is there [fol. 3-10] authority in equity to cancel the guaranty. Such authority is never presumed and if it does not appear by the record, the judgment or decree is void. Ashlock v. Ashlock, 360 Ill. 115, 121.

Congress, by enacting Section 16 (a) of the Bankruptcy Act, providing that the discharge in bankruptcy of a principal debtor shall not release the guarantor, and by remaining silent as to that point in Section 77B, appears to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits upon the guaranty, should not come within the power of the District Court.

2. The District Court in decreeing the Cancellation of the Guaranty did not comply with the Bankruptcy Act and that part of the decree is a nullity.

The District Court did not act judicially in all things before it. It transcended the power conferred by the Bankruptcy Act. It could not be conceded that if the action were upon a money demand, the court notwithstanding its complete jurisdiction over the subject and the parties, has power to pass judgment of imprisonment upon the defendant. Windsor v. McVeigh, 93 U. S. 274, 282. So much of the decree of the District Court as was in excess of its powers is void.

The general language of Section 77B of the Bankruptcy Act, although broad, cannot be held to apply to the guaranty because the question pertaining to the cancellation of the guaranty is specifically dealt with in Section 16 (a) of the Bankruptcy Act. United States v. Chase, 135 U. S. 255, 260. The specific terms of Section 16 (a) prevail over the general terms in Section 77B. Kepner v. United States, [fol. 3-11] 195 U. S. 100, 125. The District Court's powers are limited by the language of the Bankruptcy Act. Nierman v. Industrial Com., 329 Ill. 623, 627.

E. Under the decisions in In re Diversey Building Corporation, 86 Fed. (2d) 456, and In re Nine North Church St. Inc., 82 Fed. (2d) 186, 188, the Federal Court was wholly without jurisdiction of the subject matter of this guaranty, and its orders and decree pertaining to the cancellation of the guaranty are absolutely void and subject to collateral attack.

The majority opinion of the Appellate Court states that that court is unable to say that the District Court was wholly without jurisdiction. However, the leading cases on this point, those cited above, state point blank and without equivocation or reservation, that a Federal Court is without jurisdiction to cancel a guaranty while it is sitting in Bankruptcy under Section 77B for the reorganization of a "debtor" corporation.

The facts in the Diversey Bldg. Corp. case are as follows: On June 28, 1935, the District Court of the United States, entered a decree consummating the reorganization of the Diversey Bldg. Corporation. The plan contemplated the release of Becklenberg from his guarantee of the bond issue. On October 16, 1935, the debtor filed its petition for a restraining order in the District Court to restrain and enjoin one Weber and other creditors from prosecuting their suits at law or in equity against Becklenberg on his guaranty. Weber, in his answer to the petition, alleged a denial of the court's jurisdiction to restrain him from proceeding against Becklenberg. The court, however, entered a perpetual restrain-ng order enjoining Weber and other creditors from prosecuting their lawsuits against Becklen-[fol. 3-12] berg from which order Webe. and others appealed. The appellants did not accept the plan and from the decree of June 28, 1935, there was no appeal.

The Circuit Court of Appeals stated in its opinion:

"The question here presented is whether the District Court had the power to release Becklenberg from his guaranty of the old bond issue in consideration of his guaranty of the new bond issue, pursuant to the reorganization plan which had been approved by the court after its acceptance by two-thirds in amount of the allowed and effected claims of each class of creditors, but which had not been accepted by appellants, who were bondholders of the original issue. This question must be answered in the negative . . . the trouble here is that the court exceeded its jurisdiction with respect to the subject matter before it."

The court further states in its opinion that it is in accord with the conclusions expressed in the Nine North Church Street case where the facts are very similar.

The Circuit Court of Appeals in the Nine North Church St. case held specifically that the obligations arising by virtue of the guaranty are not affected by the reorganization of the debtor; that any modification of the guaranty can only be justified by the bankruptcy power which extends only to the relief of insolvent and hard pressed debtors; that the guarantor cannot modify its obligations by the reorganization of other insolvents; that Section 16(a) of the Bankruptcy Act expressly reserving a creditor's rights against the guarantor of a discharged bankrupt's debts, shows that an alteration of the guarantor's liability is not conceived to be essential to the debtor's reorganization; that the District Court had no jurisdiction to enjoin suit on [fol. 3-13] the guaranty and was without jurisdiction as to claims against the guarantor.

In re Prudence Bonds Corp., 79 Fed. (2d) 212, 215.
In re 1775 Broadway Corporation, 79 Fed. (2d) 108, 110.

This court has gone very far in upholding the principles for which a guaranty stands. In the case of Holm v. Jamieson, 173 Ill. 295, 300, a corporate note was declared by a court of equity void for want of authority of the treasurer of the corporation to execute the same. The holder sued the guarantor and this court held that the action of the court of equity holding note void does not release the absolute guarantor and the plea setting up the decree is bad.

II.

The proceedings in the United States District Court do not constitute an estoppel by verdict to the plaintiff's claim upon the guaranty nor is its judgment res adjudicata.

A. In estoppel by verdict, the court entering the decree or judgment set up as an estoppel must have the power and jurisdiction to so enter the decree or judgment.

As a general proposition, it cannot be controverted that a court must have the power and jurisdiction to enter a decree or order if that decree or order would be binding on the parties in subsequent litigation.

Miller v. Rowan, 251 Ill. 344, 348.
Munroe v. People for use of Young, 102 Ill. 406, 409, 410.
Okon v. Kaenas, et al., 222 Ill. App. 45, 48.

[fol. 3-14] The reasoning of the court as to its powers is less regarded than the judgment and decree itself and the premises which it necessarily, affirms. This court must therefore look into the Federal Court's decree and orders for the proper decision of this cause.

Deke v. Huenkemeier, 289 Ill. 148, 154.

In Okon v. Kaenas, et al., 222 Ill. App. 45, 48, the plaintiff, as transferee of a note secured by a mortgage, foreclosed on the mortgage. The decree found among other things that after the transfer of the note by the payee, the defendant-maker without notice of such transfer, deposited with the payee-transferor a sum of money on account to which he was entitled to credit in equity "on the amount unpaid." Later, plaintiff brought suit at law against defendant to recover money paid to his transferor. Defendant pleaded res adjudicata and the Appellate Court in reversing a finding for the defendant in the trial court stated that the suit upon the note was an action in personam for the amount legally due upon the note, while the foreclosure proceedings was a suit in rem, that the court in the foreclosure proceedings had no power to enter a money decree and to give credit to the defendant for the amount that he paid to the original holder of the note; that the decree for the amount of the lien was not conclusive as to the amount due upon the note or a bar to the action. This case and the one at bar are quite analogous. The proceedings in the District Court in this case was one in rem for the purpose of reorganizing the "debtor" corporation and for this alone did the court have jurisdiction and power.

[fol. 3-15] B. Motion of petitioner in the Federal Court to vacate the decree and orders cancelling the guaranty entered almost two years prior thereto for the reason that that court had no power and jurisdiction in that reorganization proceeding under Section 77B of the Bankruptcy Act to so cancel the guaranty, did not confer validity upon that part of the decree otherwise void.

The opinion of the majority of the Justices of the Appellate Court cite the case of Chamblin v. Chamblin, 362 Ill. 588, to support the proposition that petitioner cannot now complain because the question of the power of the District Court to cancel the guaranty was once put in issue by this

motion and the order of the District Court bars him forever. However, the case cited and misapplied, is one involving the law pertaining to jurisdiction over the person and not jurisdiction over the subject matter as in the case at bar. The facts in the Chamblin case are as follows:

On March 2, 1931, Chamblin sued for divorce against his wife at Reno, Nevada. Service was had by publication and Mrs. Chamblin was also served in Illinois with a summons and a certified copy of the bill of complaint. She did not appear and a default decree was entered in April, 1931. Mrs. Chamblin then brought a suit in Reno to set aside the divorce decree and a decree was entered in her favor from which Chamblin appealed to the Supreme Court of Nevada. That court reversed the decree with directions to the lower court to dismiss her suit. In April, 1933, Mrs. Chamblin filed a suit for separate maintenance in Mason County, Illinois, claiming that the decree for divorce in Nevada was obtained through fraud and that the courts [fol. 3-16] of Nevada had no jurisdiction because Chamblin was not a bona fide resident of that state when he brought suit. The Circuit Court of Mason County dismissed her suit and she appealed from that decree. This court in affirming the decree stated that the issues in the case before it, those pertaining to the residence of Mr. Chamblin in Nevada, are the same as those in the divorce proceeding and in the proceeding by Mrs. Chamblin to set aside the divorce decree.

It may be be readily comprehended that the issues involved in the Chamblin case pertained to the court's jurisdiction over the person of Mr. Chamblin and not to the court's jurisdiction over the subject matter of divorce and in this light the cases are not analogous.

The doctrine of res adjudicata can always be applied to a former adjudication if there is a finding that the court has jurisdiction over the person and in fact does have jurisdiction over the subject matter and such is the case cited. The question of jurisdiction over the subject matter was never questioned in the Chamblin case but it is questioned in the case at bar and that question must be settled in this proceeding. It is absolutely necessary to go into the question of the power of the Federal Court to cancel the guaranty because if no power can be shown, then there is no estoppel nor res adjudicata. The Appellate Court's

opinion is in substance an avoidance of the real issue in this case which is not necessarily the issue of estoppel and res adjudicata but one of jurisdiction over the subject matter of the guaranty.

[fol. 3-17] III

That part of the decree of the District Court which attempts to cancel the guaranty is an absolute nullity and subject to collateral attack.

A. The District Court exercised powers to which Section 77B of the Bankruptcy Act had no application and exceeded the powers given it by that section.

It is contended that where a court has jurisdiction of the parties and the subject matter, its decree, however erroneous, can only be attacked on appeal or error; however this rule is subject to an exception equally well settled—that a decree may be void because the court exceeded its jurisdiction. In Armstrong v. Obucino, 306 Ill. 140, the bill prayed for the enforcement of the lien by a sale beyond and contrary to the powers given by the statute for enforcing Mechanic's Liens and the court held that because the court had acquired jurisdiction of the parties and subject matter, it does not follow it could make such a decree as was prayed for; that if courts transcend their lawful powers, their decrees are void and may be collaterally impeached wherever rights claimed under them are brought in question. To the same effect are Windsor v. McVeigh, 93 U. S. 274; U. S. v. Walker, 109 U. S. 258; Novak v. Kruse, 211 Ill. App. 274; Great Western Tel. Co. v. Barker, 56 Ill. App. 402.

However, in the case at bar, the District Court did not even have the power to cancel the guaranty and not only exceeded its powers given by Section 77B but usurped another power that was never given to it. It cannot be controverted that such a decree would be subject to collateral attack and there are numerous cases to support the statement. Demilly v. Grosrenaud, 201 Ill. 272, 273; Kenney v. Greer, 13 Ill. 432; Rabbitt v. Weber & Co., 297 Ill. 491, [fol. 3-18] 495; the Confiscation Cases, 20 Wall. (U. S.) 92; Sharon v. Terry, 36 Fed. 337, 346; Ashlock v. Ashlock, 360 Ill. 115, 122; Risley v. Bank, 83 N. Y. 318. And since the District Court proceeded without jurisdiction and power to cancel the guaranty, it matters not how technically cor-

rect and precise the form of the record appears. Its decree in part is void and must be so declared; the authority was wholly usurped and the decree was the exercise of arbitrary power under the forms, but without sanction of law. People v. Seelye, 146 Ill. 189, 221; Sheldon v. Newton, 3 Ohio St. 494; Swiggart v. Harber, 4 Scam. 364; Hermandez v. Drake, 81 Ill. 34.

B. Because the District Court had no power to cancel the guaranty, it was unnecessary to appeal from its orders or decrees because they are subject to collateral attack.

People v. Leavens, 288 Ill. 447, 448; Sheahan v. Madigan, 275 Ill. 373, 377; Aldridge v. Matthews, 257 Ill. 202, 206; Oakman v. Small, 282 Ill. 360, 863.

The test of jurisdiction and power is not whether a court of review would reverse the decree rendered. An Appellate Court would reverse a decree on the ground that it was rendered without jurisdiction, but it is begging the question to say that because a reviewing court on appeal would reverse the decree, therefore it can be attacked in no manner. People v. Brewer, 328 Ill. 472, 482.

Jurisdiction and power to adjudicate and to enter judgment cannot be conferred by consent or by failure to raise the question of power in a court of review. Town of Kingston v. Anderson, 300 Ill. 577, 582; Rabbitt v. Weber & Co., 297 Ill. 491, 495.

[fol. 3-19] The Appellate Court erred in holding that petitioner should have appealed from the order denying his petition to vacate or modify the decree. It could have granted the proper relief if only it had considered the real issue in this case—that of jurisdiction over the subject matter.

Conclusion

The Appellate Court in the case at bar has overlooked the real issue involved. Petitioner contends that regardless of the fact that the Federal Court did assume jurisdiction and construed the Bankruptcy Act to give it jurisdiction to cancel the guaranty, yet if no such jurisdiction existed, there could never be a former adjudication. The question before this Honorable Court is whether or not the Federal Court had the jurisdiction and power, while

sitting in bankruptcy under Section 77B of the Bankruptcy Act for the reorganization of a "*debtor*" corporation, the principal obligor in this case, to discharge and release the gu-rantor. If that court had no such jurisdiction, then there could never be a former adjudication of petitioner's rights against the guarantor and the judgment of the Appellate Court should therefore be reversed and the judgment of the trial court affirmed.

We submit that the decision of the majority of the Appellate Court is contrary to the decisions of this court and that it failed to follow and disregarded the decisions of the United States Circuit Courts of Appeals for the Second and Seventh Circuits in the cases of In re Diversey Bldg. Corp., 86 Fed. (2d) 456; and In re Nine North Church St., Inc., 82 Fed. (2d) 186, and misapplied the facts and law of the Chamblin case to the facts in the case at bar. [fol. 3-20-4] We submit also that Justi e Matchett, one of the three Honorable Justices of the Appellate Court, agrees in his dissenting opinion with the contention of the plaintiff that under the decision in In re Diversey Bldg. Corp., the Federal Court was wholly without jurisdiction of the subj ct matter of this guaranty and its order therefore void.

Prayer for Leave to Appeal

Wherefore your petitioner respectfully prays that this Honorable Court grant this petition for leave to appeal to this court and cause the record in the Appellate Court of Illinois in and for the First District in the above entitled cause No. 39,229 in said Appellate Court to be certified to this Honorable Court for review and determination and further that this Honorable Court allow this petition to stand as petitioner's brief if this petition be allowed.

Respectfully submitted, Leo Segall, Samuel M. Bloomberg, Attorneys for Petitioner. Samuel M. Bloomberg, of Counsel.

[fol. 5] [File endorsement omitted]

[fol. 5-1] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ANSWER TO PETITION FOR LEAVE TO APPEAL—Filed May 28, 1937

To the Honorable Justices of the Supreme Court of Illinois:

The following typographical errors in the Petition should be corrected in order to preserve the good sense of the Opinion of the Appellate Court:

Page 2, 9th line from bottom, change "any" to "and".
Page 3, 17th line, change "reorganization" to "organization".
Page 5, 6th line, change "This" to "The".

In answer to the Petition of the plaintiff herein for leave to appeal, the defendant respectfully represents to the Court:

[fol. 5-2] The question here is whether the principle most recently declared in Chamblin v. Chamblin, 362 Ill. 588, at page 592, that "A Court's jurisdiction having been once attacked, the former adjudication precludes the raising of the question again," applies in this case.

The plaintiff says that the rule does not apply to this case, because, he says, "the issues involved in the Chamblin case pertained to the court's jurisdiction over the person of Mr. Chamblin and *not to the court's jurisdiction over the subject matter of divorce* and in this light, the cases are not analogous."

Apparently, the plaintiff fails to realize it is well settled that in this country the jurisdiction of courts of equity to hear and determine divorce cases is conferred only by statute (Smith v. Johnson, 321 Ill. 134, 140); that

"Courts of equity have no inherent powers in cases of divorce. * * * While such courts may exercise their powers within the limits of the jurisdiction conferred by the statute, the jurisdiction depends upon the grant of the statute and not upon general equity powers." (Smith v. Smith, 334 Ill. 370, 379);

that residence within the State of at least one of the parties is an essential jurisdictional fact, in the absence of which the courts of the State do not have power to grant a divorce, even by consent of the parties. Mr. Chamblin's residence was not a question of jurisdiction of the person, it was a question of jurisdiction of the subject matter of the suit (Garrett v. Garrett, 252 Ill. 318, 320); in other words, it was a question of power to grant the divorce he sought.

Therefore, the Chamblin case and the present case are quite analogous, in fact, almost identical in principle, except that in the present case, the plaintiff concedes jurisdiction of the persons, all necessary statutory jurisdic-[fol. 5-3] tional requirements, and jurisdiction of the subject matter of the proceedings for reorganization under Section 77-B of the Bankruptcy Act, as amended, but still insists that the U. S. District Court did not have power to cancel the guaranty and determine the rights of the plaintiff.

I

The defendant says that the three decisions of the District Court on this precise question settles the controlling question in this case, and, furthermore, that the U. S. District Court did have power to cancel the guarantee and determine the rights of the plaintiff herein in the first instance.

First, the decree confirming the plan of reorganization finds, amongst other things, that the plan complies with the provisions of subdivision (b) of Section 77-B of the Bankruptcy Act (Abst. 39).

Then, the District Court overruled written objections and a motion to vacate the cancellation of said guaranty filed by creditors of the same class as the plaintiff herein (Abst. 49).

And then, the plaintiff by his petition (Abst. 41-43) definitely submitted to the District Court for decision the question of power of the Court to enter the Decree of Confirmation cancelling the guaranty and determining the rights of the plaintiff; invoked the power of the Court to decide that question, and invoked the power of the Court to vacate or modify the Decree. The Court considered the petition of the plaintiff and his arguments, definitely decided his contentions were wrong, and in the exercise of its power to decide that question entered an order deny-

ing the petition of the plaintiff to vacate or modify the Decree of Confirmation (Abst. 51).

[fol. 5-4] Certainly, the Court had all necessary jurisdiction and power to decide as it did.

Chicago Title and Trust Company v. National Storage Co., 260 Ill. 485, 494.
Hill Co. v. Contractors Supply Co., 249 Ill. 304.
Denver First National Bank v. Klug, 186 U. S. 202.
Mueller v. Nugent, 184 U. S. 15.
Louisville Trust Company v. Comingor, 184 U. S. 25.

And that decision binds the plaintiff in this suit. In addition to:

Chamblin v. Chamblin, 362 Ill. 588, 592.
Chicago Title and Trust Company v. National Storage Co., 260 Ill. 485-495.

other cases involving bankruptcy proceedings are:

Gans v. Klein, 278 Ill. App. 96.
Henderson, et al. v. Denious, 186 Fed. 100 (C. C. A. Ark.).

and other cases to the same effect are:

Van Matre v. Sankey, 148 Ill. 536, and cases cited therein.
Gould v. Sternberg, 128 Ill. 510.
Kelly v. Donlin, 70 Ill. 378, 385.
Blakeslee v. Blakeslee, 213 Ill. App. 168.
Chicago Life Insurance Co. v. Cherry, 190 Ill. App. 70 (Certiorari denied) Affirmed 244 U. S. 25.
Forsyth v. Hammond, 166 U. S. 506, 516 and 517.

If the District Court upon the petition of the plaintiff had decided its former Decree of Confirmation exceeded its jurisdiction and power and was void, there can be no doubt as to its jurisdiction and power to decide the ques-[fol. 5-5] tion that way, and there can be no doubt as to its jurisdiction and power to vacate or modify the decree, if it was found to be void. And if it had power to determine its former decree was void, as the plaintiff prayed in his petition, it certainly had the power to determine it was not void. Having that power, its decision, whether cor-

rect or not, is binding on the plaintiff until reversed in a direct proceeding, and is not subject to collateral attack.

Fico v. Industrial Commission, 353 Ill. 74, 78.
People ex rel. Sayer v. Garnet, 130 Ill. 340.
People v. Russell, 283 Ill. 520 at 524.
Forsyth v. Hammond, 166 U. S. 506, 516 and 517.

The decision In the Matter of Diversey Building Corporation, subsequent to the decision by the District Court in this case, does not make the decision by the District Court in this case void and subject to collateral attack. People v. Russell, 283 Ill. 520.

II

Furthermore, the U. S. District Court did have power to cancel the guaranty and determine the rights of the plaintiff.

The U. S. Circuit Court of Appeals in In re Diversey Building Corporation, which is relied upon by the plaintiff to support his contentions, was careful to say at the end of its opinion in that case:

"It must be understood that this opinion is applicable only to the facts as here presented."

It does not appear in that case that the guarantor had any other interest in the proceedings except as guarantor.

There is no sweeping declaration in that case, nor in any [fol. 5-6] other, that the U. S. District Court in proceedings for reorganization under Section 77-B of the Bankruptcy Act, as amended, may not confirm such a plan as the one involved herein under all the facts and circumstances presented herein.

In the present case the Plan of Reorganization could not be carried out without the consent of stockholders holding a majority of the capital stock of the Debtor as provided in Section 77-B (e), (1), Bankruptcy Act. The consent of the stockholders and the transfer of the assets of the debtor was necessary to the consummation of the plan of reorganization. This consent was given, the capital stock of the debtor was surrendered, and all of the assets of the debtor were surrendered to the new corporation in consideration of the cancellation of the guaranty.

In In re 9 North Church Street, Inc., 82 Fed. (2d) 186, (C. C. A. 2), also relied upon by the plaintiff, the Court expressly says, at page 189 of the opinion:

"This case presents a question not presented in Re Prudence Bonds Corporation, 79 F. (2d) 212 (C. C. A. 2) since here the debtor owns the equity over the mortgage. *But there is no obligation running from the debtor to the appellants* and the appellants are not seeking to interfere with the debtor's property. They are enforcing a personal right against Maryland. The District Court here had no more jurisdiction to enjoin the state suit than it had to enjoin the foreclosure in the Prudence case. *The question would be different if the appellants held the debtor's bonds.* But the appellants here are certificate holders, not creditors of this debtor."

Since the appellants were not creditors of the debtor, the Court had no jurisdiction over them, nor over their claims. The opinion clearly shows that the decision rested upon the fact that there was no obligation from the debtor to the [fol. 5-7] appellants, and gives the unmistakable inference that if the appellants held the debtor's bonds the decision would have been different.

In In Re 1775 Broadway Corporation, 79 Fed. (2d) 108 (C. C. A. 2), the Circuit Court of Appeals expressly held that in a 77-B reorganization proceeding the court might, as a part of the reorganization plan, and after being satisfied that it was fair and just so to do, release the trustee under the mortgage bond issue from a claim of personal liability for mismanagement of the trust. In that case the Court said at page 110:

"The claims for mismanagement of the trust against the trustee, the court might have ordered released, after being satisfied that it was fair and just so to do and that sufficient consideration was paid therefor. A release of liability for mismanagement of the trust pertained to the trust res to be turned over in the reorganization. The determination as to releasing such liability was a duty cast upon the judge both in the interest of the debtor and of the noteholders. In reaching a determination, the court was obliged to appraise the possibility of success in prosecuting such claims and consider it in the light of the prospects of benefit to the noteholders under the plan of reorganization. To reach

such a determination, the court might well have considered the need of taking proofs."

The plan in the In re 1775 Broadway Corporation case was disapproved so far as the release of the trustee of claims against it for misrepresentation in selling notes (a tort claim) was concerned.

In the case of In re Central Funding Corporation, 75 Fed. (2d) 256 (C. C. A. 2nd), the plan of reorganization released the guarantor. The approval of this plan and the affirmance of the order of confirmation by the Circuit Court of Appeals, indicates clearly, that in their opinion the court below has the power and the jurisdiction to modify [fol. 5-8] an existing guaranty in a reorganization proceeding, despite the circumstance that the guarantor is not in reorganization. This case also held Section 77-B, Bankruptcy Act, to be constitutional.

The test apparently is simply whether the court in fact exercised its discretion properly and judiciously in approving the particular plan of reorganization.

The power of the District Court in this case is found in Article III, Section 2 and Article I, Section 8, Subsection Fourth, of the Constitution of the United States, and Sections 77-B (a) and (b) of the Bankruptcy Act.

In reorganization proceedings under Section 77-B, the Courts' equity powers are complete and unlimited, for Section 77-B, Bankruptcy Act, Subsection (a), provides that after the approval of the petition the Court shall have all the consistent powers which a Federal Court would have if it had appointed a receiver in equity; in other words, the court is endowed with all the jurisdiction of the Federal Court which may prove helpful or desirable in furthering the purposes and objects of proceedings under Section 77-B, the entire section evincing an intention on the part of Congress to give the court the jurisdiction and power of both bankruptcy and equity receivership courts so far as necessary or desirable to accomplish the purposes of the Section.

Other precedents for cancellation of a guaranty of bonds in equity proceedings may be found in Louisville N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 567; Thompson v. Emmett Irrigation District, 227 F. 560, 565; Sharon v. Terry, 36 Fed. 337, 351.

The test is whether the U. S. District Court would under any circumstances have the power to enter the decrees in

question, and if it had, its decrees are not subject to col- [fol. 5-9] lateral attack. O'Connor v. Board of Trustees, 247 Ill. 54, 57; Balzer v. Pyles, 350 Ill. 344, 349.

The District Court in this case, has construed. Section 77-B as providing for the cancellation of such a guaranty as the one in question and that decision is binding on the plaintiff.

Inasmuch as the plaintiff selected the U. S. District Court as the forum for the trial of the same issues which he now seeks to present to this court, he is concluded by the final adjudication in that proceeding. Chamblin v. Chamblin, 362 Ill. 588, 592.

Wherefore, the respondent suggests that the petition of the plaintiff for leave to appeal be denied.

Respectfully submitted, Albert W. Froehde, Attorney for Respondent.

[fol. 6] In Supreme Court of Illinois

[Title omitted]

Order Allowing Appeal—June 14, 1937

Now on this day the Court having duly considered the petition for leave to appeal filed herein and the Court being now advised in the premises doth grant the prayer of the petition and allow the appeal to this Court.

[fols. 7-8] In Supreme Court of Illinois

[Title omitted]

Order of Submission—October 18, 1937

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that appellant hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for

costs, and the said appellee having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the Court;

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 9] IN SUPREME COURT OF ILLINOIS

Docket No. 24207—Agenda 25—October, 1937

WILLIAM GOTTLIEB, Appellant,

v.

S. A. CROWE, JR., et al. (J. O. Stoll, Appellee)

OPINION—Filed December 15, 1937

MR. Justice SHAW delivered the opinion of the court:

Plaintiff (appellant here) brought an action in the municipal court of Chicago to recover on three bonds of $500 each, with interest thereon, against the defendants on their guaranty to pay the bonds. The defendant S. A. Crowe, Jr., was not served with process and did not enter his appearance. Stoll will hereafter be referred to as the defendant. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for $1583. An appeal was taken to the Appellate Court for the First District where the judgment of the trial court was reversed, and the cause is brought to this court by appeal, on leave granted.

The record discloses that on January 15, 1927, the Ten Fifteen North Clark Building Corporation issued its construction bonds aggregating $250,000. Some years afterward this corporation was financially embarrassed and filed its proceeding in the district court of the United States for the Northern District of Illinois, Eastern Division, under section 77-B of the Bankruptcy act, as amended. November 26, 1934, the district court entered a decree confirming a plan for re-organization of the property. The decree

found the plan for re-organization filed by the debtor had been referred to referee Adcock as special master; that the court considered the report of the master and the petition for confirmation of the plan, and found that the petition of the debtor was filed June 20, 1934, pursuant to the provisions of section 77-B of the Bankruptcy act; that on September 25, 1934, the debtor filed its proposed plan for re-organization and a hearing thereon was set for November 5, 1934, and notice given to all creditors and stockholders of the debtor by publication and by mail; that, thereafter, the plan was referred to special master Adcock and, after a hearing, he made his report on November 21, 1934, in which it was found that the plan was fair and equitable; that "It complies with the provisions of subdivision (b) of section 77-B of the Bankruptcy act;" that the plan provided it should not become effective until accepted by the required number of creditors, and that the plan was presented in good faith.

The court further found that on June 20, 1934, and there-[fol. 10] after, the debtor was unable to meet its debts as they matured and unless relief was granted by the court great loss would occur to the debtor's creditors and stockholders; that the plan for re-organization had been accepted in writing by more than two-thirds of a certain class of its creditors and by more than a majority of another class of creditors; that no objections were made to the plan and it was ordered and decreed that the report of the referee Adcock, as special master, be approved; that the plan and order of confirmation be binding upon the debtor, all stockholders and "all creditors, secured or unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have, accepted." The plan provided for the organization of a new corporation and that for each $100 of first mortgage bonds issued by the debtor there be issued to the owners one share of common stock in the new corporation known as the Olympic Hotel Building Corporation; and the plan further provided for the payment of certain overdue interest to the bondholders, and that "the personal guaranty of J. O. Stoll and S. A. Crowe, Jr., of said First Mortgage 6½% Gold Bonds shall be canceled and surrendered in consideration of the transfer of all the assets of said debtor to the Olympic Hotel Building Corporation and the surrender

of the said common stock of the debtor'' and that all claims and rights of stockholders and creditors of the debtor, upon the confirmation of the plan, be discharged and canceled, and the only rights of such stockholders and creditors shall be those accruing to them in and through the securities to be issued by the new corporation. It further appears that notice of the hearing for the purpose of considering the plan was given to plaintiff; that, after the plan was approved, it was fully carried out and bonds aggregating $206,000 which was ninety-six per cent of the total bonds outstanding, had been surrendered and canceled.

It further appears that creditors of the same class as plaintiff in the instant case, filed written objections to the cancelation of the guaranty of the defendant and moved that the confirmation of the plan, as approved by the district court, be vacated. The objections were referred to a special master to take evidence and make up his report and recommendation. The master heard the evidence and recommended that the objections be overruled and the court followed the recommendations of the master. All of the [fol. 11] assets of the debtor have been transferred to the new corporation, the Olympic Hotel Building Corporation.

Plaintiff did not appear in the proceedings in the district court, but, during the pendency of the instant case in the municipal court of Chicago, he filed his verified petition in the district court, in which he set up the ownership of the three bonds of $500, each, and that he had not approved or accepted the plan of re-organization theretofore confirmed by the district court, and averred that the district court did not have the power to cancel the written guaranty of the defendant. The prayer was that the district court enter an order vacating or modifying the decree so as to eliminate the cancelation of the guaranty. The debtor filed a verified answer to the petition in the district court, in which it set up what had been done in that court, including the cancel-ation of the guaranty, and that plaintiff had been given a number of notices of the several hearings of the matters pending in the district court. The district court considered the petition and the answer and entered an order again refusing to modify the decree of the district court approving the plan of re-organization.

Counsel for plaintiff contend that the Bankruptcy act prohibits the cancelation of a guaranty and that there is no authority in section 77-B of that act, as amended, or elsewhere, giving the Federal court, while sitting in bankruptcy under section 77-B for re-organizing a "debtor" corporation, power and jurisdiction to cancel a guaranty, and that the district court, sitting in bankruptcy under section 77-B of the Bankruptcy act for re-organization of a "debtor" corporation, was a court of limited jurisdiction and power and, therefore, that that part of the decree of the district court canceling the guaranty was void.

A Federal court is without jurisdiction to cancel a guaranty while sitting in bankruptcy under section 77-B for the re-organization of a "debtor" corporation. (In re Diversey Building Corp., 86 Fed. (2d) 456; Nine North Church Street, Inc., 82 Fed. (2d) 186.) In the Diversey Building Corp. case the circuit court of appeals stated in its opinion: "The question here presented is whether the district court had the power to release Becklenberg from his guaranty of the old bond issue in consideration of his guaranty of the new bond issue, pursuant to the re-organization plan which had been approved by the court after its acceptance by two-thirds in amount of the allowed and effected claims of each class of creditors, but which had not been [fol. 12] accepted by appellants, who were bondholders of the original issues? This question must be answered in the negative. * * * The trouble here is that the court exceeded its jurisdiction with respect to the subject matter before it." The district court was wholly without jurisdiction of the subject matter of this guaranty and that part of its order was therefore void. See, also, Armstrong v. Obucino, 300 Ill. 140.

The defendant contends, however, that the jurisdiction of the district court having once been attacked, the question can not again be raised; that since the district court overruled written objections and a motion to vacate the cancelation of the guaranty filed by creditors of the same class as the plaintiff, and since the plaintiff, by his petition, submitted to the district court for decision the question of the power of the court to cancel the guaranty and determine the plaintiff's rights, the plaintiff is bound by the decision of the district court. The case of Chamblin v. Chamblin, 362 Ill. 588, is cited in support of this conten-

tion. In that case Chamblin sued for divorce against his wife at Reno, Nevada. Service was had by publication and Mrs. Chamblin was also served in Illinois with a summons and a certified copy of the bill of complaint. She did not appear and a default decree was entered in April, 1931. Mrs. Chamblin then brought a suit in Reno to set aside the divorce and a decree was entered in her favor from which Chamblin appealed to the Supreme Court of Nevada. That court reversed the decree with directions to the lower court to dismiss her suit. In April, 1933, Mrs. Chamblin filed a suit for separate maintenance in Mason county, Illinois, claiming that the decree for divorce in Nevada was obtained through fraud and that the courts of Nevada had no jurisdiction because Chamblin was not a bona fide resident of that State when he brought suit, which was the same issue of fact previously presented to the Nevada court. The circuit court of Mason county dismissed her suit and she appealed from that decree. This court affirmed the decree.

The distinction between the Chamblin case and this one is apparent. It is the difference between a determination of a question of fact in the Chamblin case and the drawing of a conclusion of law in this one. In the Chamblin case, the court had to decide a jurisdictional fact,—i. e., whether or not Chamblin had been a bona fide resident of the State of Nevada for the required length of time. In this case, no question of jurisdictional fact is involved, the district [fol. 13] court merely assuming that it had jurisdiction when it had none. The inherent power to determine the existence or non-existence of jurisdictional facts is an attribute which is essential to the functioning of every court. On the other hand, no court can expand its statutory or constitutional powers by a recital that it has jurisdiction of the subject matter. One act requires the determination of a fact which the court has power to determine; the other would be drawing a legal conclusion which the court would be barred from drawing by the statute or constitution which created it. If courts could not determine the necessary jurisdictional facts they could not function, and, on the other hand, if by a recital they could assume powers not given to them there would be no way, by statute or constitution, to limit their jurisdiction.

In the case before us the district court did not have jurisdiction of the subject matter of the guaranty and its order in that respect is void and subject to collateral attack. (Demilly v. Grosrenaud, 201 Ill. 272; O'Connor v. Board of Trustees, 247 id. 54; Rabbitt v. Weber & Co., 297 id. 491; Ashlock v. Ashlock, 360 id. 115.) Jurisdiction of the subject matter cannot be conferred by consent, is not waived by appearance and may be raised at any time. Town of Kingston v. Anderson, 300 Ill. 577; Rabbitt v. Weber & Co., supra.

The judgment of the Appellate Court is reversed, and the judgment of the municipal court of Chicago is affirmed.

Judgment of Appellate Court reversed.
Judgment of municipal court affirmed.

Jones and Wilson, JJ., dissenting.

[fols. 14-15] IN SUPREME COURT OF ILLINOIS

No. 24207

WILLIAM GOTTLIEB, Appellant,

vs.

S. A. CROWE, JR., et al.,

J. O. STOLL, Appellee

Appeal from Appellate Court, First District

JUDGMENT—December 15, 1937.

And now, on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the Judgment aforesaid, there is manifest error; Therefore, it is considered by the Court that for that error and others in the record and proceedings aforesaid the Judgment of the Appellate Court of First District in this behalf rendered, be reversed, annulled, set aside and wholly for nothing esteemed, and

It is further considered by the Court that the Judgment of the Municipal Court of Chicago be Affirmed in all things and stand in full force and effect.

And it is further considered by the Court that the said Appellant recover of and from the said Appellee his costs by him in this behalf expended to be taxed, and that he have execution therefor.

Clerk's certificate to foregoing paper omitted in printing.

[fols. 16-17] [File endorsement omitted]

IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER STAYING ALL FURTHER PROCEEDINGS UNTIL NEXT TERM—Filed December 31, 1937

This cause coming on to be heard upon the motion of Albert W. Froehde, attorney for the appellee herein, affidavit in support thereof, due notice to the attorneys for appellant, proposed Petition for Rehearing, and the undersigned Justice having considered the same; and

It Appearing to the Court that a notice in writing of appellee's intention to ask for a rehearing has been filed with the Clerk and delivered to the Official Reporter; and

It Appearing to the Court that appellee has made application for a stay of all further proceedings to Mr. Justice Elwyn R. Shaw, who wrote the opinion in this cause, who has authorized and permitted the appellee to make application for a stay to the undersigned Justice; and

Being of the opinion that this cause should be further considered by the Court on the Petition for a rehearing:

It Is Ordered that all further proceedings in this cause be, and hereby are, stayed until the next term of this Court.

Enter:

Francis S. Wilson, Justice.

Dated December 30, 1937.

[fol. 18] [File endorsement omitted]

[fol. 18-1] IN SUPREME COURT OF ILLINOIS

[Title omitted]

PETITION FOR REHEARING—Filed January 4, 1938

Now comes J. O. Stoll, appellee, by Albert W. Froehde, his attorney, and presents herewith his petition for rehearing of the above-entitled cause and respectfully prays that a rehearing be granted in said cause upon the grounds and for the reasons hereinafter set forth in the petition herewith presented.

Albert W. Froehde, Attorney for J. O. Stoll, Appellee.

May it please the Court:

The appellee believes that this Honorable Court has overlooked that it is not called upon in this case to construe Section 77-B of the Bankruptcy Act, and that the controlling principle is the doctrine of res judicata.

[fol. 18-2] The appellee believes that this Honorable Court failed to give full faith and credit to which they are entitled to the two, considered, separate, judgments, not mere recitals of jurisdiction (Abst., 49, Par. 13; and Abst., 51), of the United States District Court, which were entered at different times (Guaranty canceled November 26, 1934, Abst., 35-41; Judgment on jurisdiction, 1935, Abst., 49; Judgment on jurisdiction, May 20, 1936, Abst., 51), upon pleadings, proof, hearing and argument (Abst., 31, Par. (3); Abst., 37, Par. 6; Abst., 39, Par. F; Abst., 49, Par. 12; Abst., 41 to 50), and which determined the original question of law involved herein, because the court inadvertently overlooked the special circumstances of this case and inadvertently misapprehended the law applicable thereto; particularly in view of the fact that the court in its present opinion does not cite any cases applicable to the controlling question; and the appellee believes and prays that upon a re-examination of the circumstances of, and authorities applicable to, this case that the court will sustain the judgment of the Appellate Court.

Van Matre v. Sankey, 148 Ill. 536, Forsyth v. Hammond, 166 U. S. 506, and Henderson, et al. v. Denious, 186 Fed.

100 (C. C. A. Ark.), (appellee's answer, p. 4), which were cited by appellee but not quoted, hold squarely that the principle of Chamblin v. Chamblin, 362 Ill. 588, applies to a question of law.

A thorough search fails to disclose any applicable case on a question of law to the contrary.

The appellee wishes to respectfully point out that the cases cited by this court were not determined on a question of law—the judgments in Demilly v. Grosrenaud, 201 Ill. 272; Rabbitt v. Weber & Co., 297 Ill. 491; and Ashlock v. Ashlock, 360 Ill. 115, were set aside because of the absence [fol. 18-3] of a statutory jurisdictional fact. The O'Connor v. Board of Trustees, 247 Ill. 54, case denied a second attack upon a decree, and sustains the judgment of the Appellate Court in this case.

We have here a collateral second attack upon a decree, based upon a question of law, after an unsuccessful identical direct first attack upon the same decree. It may be said that the adjudication of the first attack shields the original decree from any further collateral attack.

The Appellate Court said in its decision (Appellant's Pet., p. 5):

"• • • The District Court expressly found that the debtor had complied with all the provisions of Section 77-B of the Bankruptcy Act and construed the Bankruptcy Law as authorizing the cancellation of the guaranty. That court on two occasions expressly passed on this question, viz., when creditors of the same class raised the question as above stated, and afterward when plaintiff in the instant case again raised the question. The question was there squarely put in issue and if plaintiff or the other creditors were dissatisfied with the decision of the District Judge they should have appealed from his decision to the United States Circuit Court of Appeals, where they probably would have obtained relief."

The appellee respectfully suggests that before this court proceeds to consideration of the disputed question of law whether the United States District Court had power to cancel the guaranty by its original decree, it should dispose of the two judgments (not mere recitals) of the United States District Court on this precise question of law.

[fol. 18-4] I

Disregarding, for a moment, this disputed question of whether the United States District Court had the power to cancel the guaranty by its original decree, (which disputed question need not be settled by this court and should be settled in a direct proceeding), the appellee wishes to respectfully point out that there is no question in this case of conferring jurisdiction by consent, or appearance, nor any denial that the question of jurisdiction of the subject matter may be raised at any time, and the following three cases (Appellee's Ans., p. 4) squarely decide that the principle enunciated by this court in Chamblin v. Chamblin, 362 Ill. 588, applies to a jurisdictional question of law as well as a jurisdictional question of fact.

Inasmuch as these following cases were cited but not quoted by the appellee and the Court makes no comment thereon in its opinion, the appellee prays the indulgence of the Court to permit the appellee to quote these cases at such length as is necessary to show the application thereof to this case.

Forsyth v. Hammond, 166 U. S. 506

The City of Hammond, Indiana, instituted proceedings before County Commissioners to extend its limits, which proceedings were taken by appeal to the Circuit Court of Lake County, Indiana, where a decree was entered in favor of the city for the annexation of property belonging to Forsyth. Forsyth appealed from this decree to the Supreme Court of Indiana, where the decree was affirmed, on April 11, 1895. On April 26, 1895, Forsyth, as plaintiff filed a bill for an injunction in the Circuit Court of the United States for [fol. 18-5] the District of Indiana, which was dismissed. An appeal was taken from the dismissal to the U. S. Court of Appeals for the 7th Circuit, which court reversed the decree of the U. S. Circuit Court. Certiorari was granted by the U. S. Supreme Court. Beginning on page 515 the U. S. Supreme Court said:

"Coming now to the merits of the case it appears that on the pivotal question of the validity of the annexation proceedings the decision of the Supreme Court of the State is one way and that of the Court of Appeals directly the reverse. It is insisted by the plaintiff that the determina-

tion of the boundaries of a municipal corporation in the first instance, and any subsequent change in its boundaries by annexation of outside territory, are matters solely of legislative cognizance, and not judicial in their nature; that such is the general rule obtaining in the several States of the Union and up to the time of the decision of the Supreme Court of Indiana in this controversy, recognized in that State as elsewhere; that, therefore, the judicial proceedings in respect to this controversy in the courts of the State, culminating in the decision of its highest court, were beyond the jurisdiction of such courts, and not to be regarded as creating an adjudication binding upon other tribunals.

* * *

But back of any criticism of the reasoning of the Supreme Court [of Indiana] *in its two opinions lies the fact of its decision.* And here these things appear. The city of Hammond sought to bring within its limits, among other territory, the lands of plaintiff. After action by the city council, the city instituted proceedings before the county commissioners, which proceedings were subsequently taken by appeal, as prescribed by statute, to the Circuit Court, a court of general jurisdiction, and in that court a decree was entered annexing plaintiff's lands to the City of Hammond. Were or were not these proceedings valid, and was or was not such decree a binding adjudication which neither the city nor the plaintiff could elsewhere dispute? That question certainly is one of a judicial nature. Now, it is no less a judicial function to consider whether those pro- [fol. 18-6] ceedings and that decree were valid and effective, and determine that they were and operated to annex plaintiff's territory to the city, than to enter upon a like consideration and determine that they were invalid and ineffective to make such annexation. The decision of the Supreme Court of Indiana was in favor of the validity, that of the Court of Appeals against their validity, and if it is judicial to hear and determine one way, it is likewise judicial to hear and determine the other. If action by the state tribunals stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the Su-

preme Court of the State to have that claim established. She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum and there challenged the decree of the Circuit Court, challenged it for error and also for lack of jurisdiction. The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of res judicata apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of res judicata have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between [fol. 18-7] the parties in all subsequent actions. Cromwell v. Sac County, 94 U. S. 351; Lumber Co. v. Buchtel, 101 U. S. 638; Stout v. Lye, 103 U. S. 66; Nesbit v. Riverside Independent District, 144 U. S. 610; Johnson Co. v. Wharton, 152 U. S. 252; Last Chance Mining Co., 157 U. S. 683." (Italics and bracket insert ours.)

The decree of the U. S. Court of Appeals was reversed.

Henderson et al. v. Denious, 186 Fed. 100 (C. C. A. Ark.)

In the case of Henderson, et al. v. Denious, 186 Fed. 100 (C. C. A. Ark.) a Trustee in Bankruptcy filed a petition under Section 60 (d) of the Bankruptcy Act to reexamine a transaction between the bankrupt and Henderson. Notice of this proceeding was given to Henderson by mail. Henderson did not appear in the proceeding, and the referee, upon re-examination of the transaction, entered an order finding the transaction to be void, except as to eight hundred dollars ($800), and ordered the trustee to proceed to

recover the excess over that amount in the possession of Henderson. After the entry of the order by the referee, Henderson appeared before the referee and challenged the jurisdiction and power of the referee to make the order. The decision of the referee that he had power and jurisdiction to make the order complained of was sustained upon an appeal.

Thereafter, the trustee brought an action against Henderson to recover the amount found due in the re-examination proceedings. Henderson made offers of proof in an attempt to again show that the referee did not have jurisdiction and power to decide the questions which were before him in the re-examination proceedings, which were refused by the trial court, and Henderson also objected to the suf- [fol. 18-8] ficiency of the proof of the re-examination proceeding.

The Circuit Court of Appeals held: (1) the question of the jurisdiction and power of the referee in the first proceedings was finally and conclusively settled by the first attack; (2) the first attack settled all the questions of jurisdiction, fact, or law now sought to be relitigated by way of defense; (3) the original order of the referee possessed all the attributes of finality and estoppel accorded domestic judgments emanating from courts of general original jurisdiction.

Van Matre v. Sankey, 148 Ill. 536

The case of Van Matre v. Sankey, 148 Ill. 536, involved a second attack, such as we have here, on the construction of the adoption statute of Pennsylvania by the courts of that state; and this honorable court said, on page 552:

"Where a statute of a state has been given construction by the highest tribunal of the State, such construction will, ordinarily, in the courts of a sister State, be adopted as binding and conclusive. (Hunt v. Hunt, 71 N. Y. 217; Gilchrist v. Company, 21 W. Va. 115; Gunn v. Howell, 35 Ala. 144; McDeed v. McDeed, 67 Ill. 545; Kingsley v. Kingsley, 20 Ill. 203.) The same rule has been recognized by the Supreme Court of the United States. (Walker v. Harbor Comrs., 17 Wall, 648; Bailey v. Magwire, 22 Wall. 215; Gilpin v. Page, 18 id. 350; Seacomb v. Railroad Co., 23 id. 108; Burgess v. Seligman, 107 U. S. 20; Bucher v. Cheshire Co., 125 id. 555.) And this, although the examining court

finds that, upon similar language in a statute within their own sovereignty, they would place a different and even reverse construction. (Supra.)''

The second attack failed.

The following two cases, although they deal with ques-
[fol. 18-9] tions of fact, are analogous because in the first case the original judgment had ceased to exist because of reversal by this court before the decree attacked was entered, and in the second the original decree was void for want of service of process, but in both cases this court held that the original judgment and decree were sh elded from attack by subsequent valid decrees.

Gould v. Sternberg, 128 Ill. 510

In the case of Gould v. Sternberg, 128 Ill. 510, it appears that in January, 1868, Sternberg recovered a judgment against Gould on a note. The parties then engaged in a number of suits. On January 30, 1874, this court reversed that judgment.

In the meantime, Sternberg had filed a bill in chancery to set aside fraudulent conveyances of certain land, in which proceedings a decree was entered on March 4, 1874 (after the reversal of the original judgment), finding that certain deeds were void, and ordering that title to the premises in question be vested in Sternberg under a sheriff's deed dated May, 1870, based upon the original judgment, and that Sternberg was entitled to possession of the premises and that a writ of possession issue. The reversal of the original judgment was not brought to the court's attention, and the decree was later affirmed by this court.

On September 23, 1881, Sternberg obtained another sheriff's deed by execution and sale upon the original judgment of January, 1868.

Sternberg then brought an action of ejectment; the trial court found the issues in favor of Sternberg and entered judgment in favor of Sternberg, which was appealed to this court upon the ground that the reversal of the original
[fol. 18-10] judgment of January, 1868, by this court on January 30, 1874, annulled and wiped out the legal effect of all that had been done under and in pursuance of that judgment.

This court said:

"It is well settled in this State that when property of a defendant has been sold on a judgment, afterward reversed, to a party to such judgment, the defendant can recover it back. If the purchaser be a third party, he can recover from the plaintiff the value thereof, but the title to the property, in that case, is unaffected by the reversal. No one but the defendant or his assignees can take any advantage of that right, or, if he has lost nothing by the judgment, he can, of course, gain nothing by its reversal. A sale on execution, based on a judgment afterward reversed, is not, therefore, we conclude, absolutely void, but voidable only, at the election of the owner of the property sold.

The question at issue in the chancery cause between defendant in error and Hiram Gould and others, was, whether or not she should have the title to this land, and the decree was in her favor. However erroneous that decree might have been, it was binding upon the parties until vacated or reversed; but having been affirmed by this court, it is to be regarded as free from all errors. A judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them. (Freeman on Judgments, sec. 249.) The decree vesting title in defendant in error, is res judicata as to Hiram Gould and James Gould and their privies, and can not be questioned in this suit."

[fol. 18-11] Kelly v. Donlin, 70 Ill. 378

Kelly v. Donlin, 70 Ill. 378, at 385, (Appellee's Ans., page 4) held that a decree quieting title in Illinois based on a purchase at an administrator's sale, is not void because the decree ordering the sale was void for want of service on the heirs, as they were called upon to bring forward all their defenses.

The other cases cited by the appellee (Appellee's Ans., page 4) deal with matters of fact.

VanFleet's Collateral Attack

On page 26, Section 17, says:

"Motions.—On the same principle that an erroneous

ing on a motion is not void, and may shield a proceeding from collateral attack which would otherwise be void. Thus, where a judgment against one partner is void for want of service, and he appears specially and moves to vacate it for that reason, the denial of his motion makes the judgment valid collaterally (Ferguson v. Millender, 32 W. Va. 30 (9 S. E. R. 38)). His presentation of the motion gave the court jurisdiction to decide it, and the decision was not void, although erroneous; and, until set aside, it necessarily protects the void judgment from further attack. An order refusing to vacate a judgment on a petition showing a want of service, is conclusive on that question (Weber v. Tschetter, — S. D. —(46 N. W. R. 201). On this point many cases confuse the two doctrines. Thus, a person appeared in the federal court and filed a petition to set aside proceedings in confiscation, which was denied. She then sued the purchaser of the property at the confiscation sale, in a state court of New York, and the court of appeals thinking the confiscation proceedings void, she was allowed to recover (Chapman v. Phoenix National Bank, 85 N. Y. 437, reversing 44 N. Y. Super. (12 Jones & Spencer) 340). That [fol. 18-12] learned court failed to perceive that, concerning the validity of the confiscation proceeding, she had had her day in a competent court, and that overhauling the decision of the federal court on her petition was simply usurpation."

In Fico v. Industrial Commission, 353 Ill. 74 (Appellee's Ans., p. 5), the Circuit Court of Cook County, on May 9, 1930, refused to enter a judgment on an award for compensation because no jurisdiction existed, and then, over two years later, on December 27, 1932, reversed its previous decision and entered a judgment on the award. This court said (page 78):

"If the original application on May 9, 1930, had been decided adversely to Bottigliero, and judgment entered on the award in favor of Fico, certainly no one would contend that Bottigliero could keep on filing motions indefinitely in the hope that some judge would set the award aside. * * * Whether the Circuit Court decides to render a judgment in accordance with the award or declines to enter such confirmance because no jurisdiction appears to sustain the

award, its decision, nevertheless, is a judgment in either event."

In People ex rel. Sayer v. Garnet, 130 Ill. 340, (Appellee's Ans., p. 5), the Illinois Appellate Court dismissed an appeal because the statute authorizing it was void. The appellant applied to the Supreme Court for a writ of mandamus to compel the Appellate Court to proceed and hear the cause. It was held that the action of the Appellate Court was judicial; that it thereby "judicially determined a question incident to the proceedings and properly arising therein." This case is an authority that the decision holding a statute void, even though erroneous, is not void. If the decision had been void, the Appellate Court would have been compelled by mandamus to take jurisdiction.

[fol. 18-13] The appellee respectfully suggests that even though this Honorable Court believes the U. S. District Court has misconstrued the Constitution and statutes of the United States of America, that this Honorable Court should not ignore nor nullify the judgments (not mere recitals) of the U. S. District Court on this precise question (Van Matre v. Sankey, 148 Ill. 536, and Forsyth v. Hammond, 166 U. S. 506); and should give the judgments of the U. S. District Court full faith and credit; that the Constitution and laws of the United States provide that appeal from the decisions of the United States District Court is to the U. S. Circuit Court of Appeals, and not to the Municipal Court of Chicago. Also, that the plaintiff chose not to appeal from the decision he sought from the United States District Court; and that this decision thereupon became as final and binding upon the appellant, as it would be if entered by a higher court on appeal. The following case is cited with approval in Hill Co. v. Contractors' Supply Co., 249 Ill. 304.

In In re First Nat. Bank of Belle Fourche, 152 Fed. 64, the court, in considering whether or not it had jurisdiction to decide on the merits or only as to the jurisdiction, said (p. 69):

"The court had the same jurisdiction to decide the issues between the parties whether the Widell Company was or was not principally engaged in a manufacturing pursuit. The only difference the determination of that issue made was, that if it was so engaged the court should have given

judgment for the petitioners and if it was not thus occupied it should have rendered judgment against them. The jurisdiction and the duty to decide remained in the court, whichever way it was its duty to determine the issue. The jurisdiction of a court is not limited to the power to render correct decisions. It is the power to decide the issues according to its view of the law and the evidence, and its wrong decisions are as conclusive as its right ones.

[fol. 18-14] It empowers the court to determine every issue within the scope of its authority, whether its decision is right or wrong, and *every* judgment or decision so rendered is final and conclusive upon the parties, unless reversed by writ of error or appeal or vacated by some *direct* proceeding." (Italics ours.)

and on page 70 it is also said:

"While the jurisdiction of the national courts is limited, they are not inferior courts, and their judgments possess every attribute of finality and estoppel which pertains to those of courts of general jurisdiction.

McCormick v. Sullivant, 10 Wheat. 192, 199, 6 L. Ed. 300;
Ex parte Watkins, 3 Pet. 193, 207, 7 L. Ed. 650;
Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552, 557, 559, 8 Sup. Ct. 217, 31 L. Ed. 202;
Edelstein v. U. S. (C. C. A.) 149 Fed. 636."

Henderson, et al. v. Denious, 186 Fed. 100 (C. C. A. Ark.) is to the same effect.

II

With reference to the original decree of confirmation cancelling the guaranty, the appellee wishes to respectfully call the court's attention to the fact that Section 16 (a) of the Bankruptcy Act applies to a bankrupt. It is not necessary for a corporation to be bankrupt in order to reorganize under Section 77-B. No discharge in bankruptcy is contemplated by Section 77-B. As the court says in Continental Bank v. Rock Island Railway, 294 U. S. 648, 670: "But a proceeding under Section 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to [fol. 18-15] that end can be devised." Section 77-B is likewise not an ordinary proceeding in bankruptcy. It does not

contemplate a discharge in bankruptcy. Section 16 (a) of the Bankruptcy Act does not prohibit the exercise of the court's equitable power under this section. All that Section 16 (a) of the Bankruptcy Act says is that the circumstance of the discharge of a bankrupt does not alter the liability of his guarantor.

Appellee wishes to respectfully call the court's attention to page 8 of his answer, where the authority of the United States District Court to cancel a guaranty is set out; and also to the cases In Re 1775 Broadway Corporation, 79 Fed. (2d) 108 (C. C. A. 2nd); and In re Central Funding Corporation, 75 Fed. (2d) 256 (C. C. A. 2nd), in which similar plans of reorganization were approved.

The appellee wishes to respectfully call attention to the fact that the four cases which involved cancellation of a guaranty under Section 77-B were determined on questions of fact—two of them holding that the guaranty could not be canceled, and two cases holding that it could be canceled, under the facts and circumstances that appeared in each case.

In view of the fact that this court possibly has inadvertently overlooked the matters hereinabove pointed out, we respectfully urge that a rehearing should be granted and that on such rehearing the judgment of the Appellate Court should be affirmed.

Respectfully submitted, Albert W. Froehde, Attorney for J. O. Stoll, Appellee.

[fols. 19-20] In Supreme Court of Illinois

[Title omitted]

Order Denying Rehearing—February 10, 1938

Now on this day the Court having duly considered the petition for rehearing filed herein and the Court being now advised in the premises doth overrule the prayer of the petition and denies a rehearing of this cause.

[fol. 21] IN SUPREME COURT OF ILLINOIS

[Title omitted]

NOTICE OF MOTION—Filed February 14, 1938

To Samuel M. Bloomberg and Leo Segall, Attorneys for Appellant, 77 West Washington, Street, Chicago, Illinois:

Please Take Notice that on Monday, the 14th day of February, A. D. 1938, I shall file in the Office of the Clerk of the Supreme Court of Illinois a motion on behalf of J. O. Stoll, Appellee, to stay all further proceedings in this cause until the time for filing a petition for writ of certiorari by appellee in the Supreme Court of the United States shall have expired; and if within said time a petition for writ of certiorari is presented to the Supreme Court of the United States, that the stay of mandate continue in force and effect until final disposition of said cause in the Supreme Court of the United States. A copy of said motion, together with the suggestions and affidavit in support thereof, are handed you herewith.

A. W. Froehde, Attorney for Appellee.

Received a copy of the foregoing notice, said motion, together with the suggestions and affidavit in support thereof, this 11th day of February, A. D. 1938.

Samuel M. Bloomberg, Leo Segall, Attorneys for Appellant.

[fol. 22] IN SUPREME COURT OF ILLINOIS

[Title omitted]

MOTION TO STAY MANDATE PENDING DETERMINATION OF PETITION TO SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI—Filed February 14, 1938

And now comes the appellee and moves the Court that issuance of the mandate of this Court upon its judgment reversing the judgment of the Appellate Court of Illinois, First District, and affirming the judgment of the Municipal Court of Chicago, be stayed until the time for filing a petition for writ of certiorari by appellee in the Supreme Court of the United States shall have expired; and if within said time a petition for writ of certiorari is presented to the Supreme Court of the United States, that the stay of mandate continue in force and effect until disposition of said

cause in the Supreme Court of the United States, provided the appellee shall file a bond with good and sufficient security to be approved by this Court in an amount and within the time required by this Court, conditioned upon the filing of said petition for a writ of certiorari within the time allowed by law and payment of all damages and costs that may be awarded upon failure to make his plea good.

A. W. Froehde, Attorney for Appellee.

[fol. 23] IN SUPREME COURT OF ILLINOIS.

[Title omitted]

SUGGESTIONS IN SUPPORT OF MOTION TO STAY MANDATE—Filed February 14, 1938

Jurisdiction of the Supreme Court of the United States appears from the Statement of Jurisdiction, presented herewith. Jurisdiction does not depend upon the sum involved in the controversy on appeal from a State Court to the Supreme Court of the United States (Hughes, Federal Practice, Vol. 5, page 285, ch. 74, Sec. 3183).

The Federal questions involved are the construction of Section 77-B of the Bankruptcy Act; the faith, credit and effect to be given to judgments and decrees of the Federal Courts; and the conflict of decision between the State Court and the United States District Court.

The errors relied upon for reversal appear in the Assignment of Errors, presented herewith.

The appellee filed bond in the amount of $1,750.00, upon appeal from the Municipal Court of Chicago to the Appellate Court of Illinois, First District. The mandate of the Appellate Court of Illinois, First District, has been stayed, pending final disposition of this cause.

Rule 38, paragraph 6 of the Supreme Court of the United States provides that a stay of execution may be granted by a judge of the court rendering the judgment and may be [fol. 24] conditioned on the giving of security as in Section 8 (d) of the Act of February 13, 1925, provided, and in accordance with Rule 36 paragraphs 1 and 2.

Rule 36, paragraph 2 of the Supreme Court of the United States, provides for a bond, with good and sufficient security, that the appellant will prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment is for the re-

covery of money not otherwise secured must be for the whole amount of the judgment, including just damages for delay, and costs and interest on the appeal.

Respectfully submitted, A. W. Froehde, Attorney for Appellee.

Duly sworn to by A. W. Froehde. Jurat omitted in printing.

[fols. 25-26] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER STAYING MANDATE—February 16, 1938

Now on this day the Court having duly considered the motion by appellee that issuance of mandate be stayed until time for filing a petition for writ of certiorari in Supreme Court of the United States shall have expired and if within said time petition for certiorari is presented, that stay of mandate continue until disposition of cause in Supreme Court of the United States, provided that Bond be filed to be approved by this Court, and the Court being now advised in the premises, grants the motion.

It is Ordered by the Court that the mandate be stayed for sixty days. Bond is fixed at $2500.00, sureties to be approved by the Court or any Judge thereof in vacation.

[fol. 27] IN SUPREME COURT OF ILLINOIS

[Title omitted]

NOTICE OF MOTION—Filed February 14, 1938

To Samuel M. Bloomberg and Leo Segall, Attorneys for Appellant, 77 West Washington Street, Chicago, Illinois:

Please Take Notice that on Monday, the 14th day of February, A. D. 1938, I shall file in the Office of the Clerk of the Supreme Court of Illinois, a motion on behalf of J. O. Stoll, Appellee, for leave to file certified copies of Brief for Appellant and Brief for Appellee, heretofore filed in the Appellate Court of Illinois, First District; together with a Statement of Jurisdiction of the Supreme Court of the United States, as provided in Rule 12 of said Court; and an Assignment of Errors; for the purpose of completing the Record on petition to the Supreme Court of the United

States for a writ of certiorari to review the judgment of the Supreme Court of Illinois. A copy of said motion, together with the suggestions and affidavit in support thereof, the said Statement of Jurisdiction, and Assignment of Errors are handed you herewith.

A. W. Froehde, Attorney for Appellee.

[fol. 28] Received a copy of the foregoing notice, said motion, together with the suggestions and affidavit in support thereof, said Statement of Jurisdiction and Assignment of Errors this 11th day of February, A. D. 1938.

Samuel M. Bloomberg, Leo Segall, Attorneys for Appellant.

[fol. 29] In Supreme Court of Illinois

[Title omitted]

Motion for Leave to File Appellate Court Briefs, Statement of Jurisdiction of the Supreme Court of the United States and Assignment of Errors—Filed February 14, 1938

Now comes the appellee and moves the Court that leave be given the appellee to file certified copies of Brief for Appellant and Brief and Argument for Appellee, heretofore filed in the Appellate Court of Illinois, First District; together with a Statement of Jurisdiction of the Supreme Court of the United States, as provided in Rule 12 of said Court; and an Assignment of Errors; all of which are presented herewith with suggestions and affidavit in support hereof, for the purpose of completing the Record on petition to the Supreme Court of the United States for a writ of certiorari to review the judgment of this Court.

A. W. Froehde, Attorney for Appellee.

[fol. 30] In Supreme Court of Illinois

[Title omitted]

Suggestions in Support of Motion for Leave to File Appellate Court Briefs, Statement of Jurisdiction of the Supreme Court of the United States, and Assignment of Errors—Filed February 14, 1938

The appellee desires and intends to file a petition to the Supreme Court of the United States for a writ of certiorari to review the judgment of this Court.

Re Appellate Court Briefs.

Rule 38, paragraph 2 of the Supreme Court of the United States provides that a supporting brief may be included in the petition in conformity with Rules 26 and 27.

Rule 27, paragraph 2 (c) provides that if paragraph 1 of Rule 12 has not been complied with, a concise statement of the grounds on which the jurisdiction of that court is invoked, embodying all facts required to be set forth in the statement described in that paragraph shall be contained in the brief.

Rule 12, paragraph 1, provides that the statement of jurisdiction shall specify the state in the proceedings in the Court of first instance, and in the appellate court, at which, and the manner in which, the Federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); * * * with pertinent quotations of specific portions of the record, or summary thereof, [fol. 31] with specific reference to the places in the record where the matter appears, * * * as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on the Supreme Court of the United States.

Rule 36 (2) of this court provides that no assignment of errors shall be necessary, except the statement in the brief at the conclusion of the statement of the case, of the errors relied upon for reversal, as required in Rule 39; and Rule 39 provides that the concluding subdivision of the statement of the case shall be a brief statement of the errors or cross-errors relied upon for reversal, and that the brief of the appellee shall contain a brief statement of the propositions by which he seeks to meet the alleged errors and to sustain the judgment.

It is therefore necessary that the record presented to the Supreme Court of the United States contain the errors relied upon by the appellant and the propositions by which the appellee sought to meet the alleged errors in the Appellate Court, which can only be shown by appropriate reference to the briefs of the Appellant and Appellee in the Appellate Court.

Re Statement of Jurisdiction of the Supreme Court of the United States

Rule 38, paragraph 2 of the Supreme Court of the United States provides that the brief supporting a petition for a writ of certiorari must be in conformity with Rule 27.

Rule 27, 2 (c) requires a statement of jurisdiction of the Supreme Court, pursuant to paragraph 1, Rule 12.

This statement of jurisdiction will also be of assistance to this Court in passing upon the petition for stay of mandate presented herewith.

Re Assignment of Errors

Rule 27, paragraph 4 of the Supreme Court of the United States provides that when there is no assignment of errors, as required by Section 997 of the Revised Statutes of the United States, counsel will not be heard; and that errors [fol. 32] not specified according to paragraph (e) Rule 27 of the assigned errors intended to be urged will be disregarded.

The practice in Illinois does not require assignment of errors, so that no assignment of errors appears in the record thus far.

It is necessary that there be an assignment of errors in the record.

A. W. Froehde, Attorney for Appellee.

[fols. 33-34] In Supreme Court of Illinois

[Title omitted]

Order Overruling Motion for Leave to File Appellate Court Briefs, etc.—February 16, 1938

Now on this day the Court having duly considered the motion by appellee that leave be given to file certified copies of briefs filed in Appellate Court, together with statement of jurisdiction of Supreme Court of United States, and an assignment of errors, and the Court being advised in the premises, overrules and denies the motion.

[fols. 35-42] Notice and bond on stay for $2,500.00, approved and filed March 2, 1938, omitted in printing.

[fol. 43] IN SUPREME COURT OF ILLINOIS

[Title omitted]

PRÆCIPE FOR RECORD—Filed February 20, 1938

The Clerk of the Supreme Court of Illinois will make up a complete authenticated transcript of the record in the above entitled cause to be filed with the Clerk of the Supreme Court of the United States on petition for writ of certiorari to review the judgment of this Court; and is directed to include therein:

1. Printed Abstract of Record.
2. Petition for Leave to Appeal.
3. Answer to Petition for Leave to Appeal.
4. Order taking cause under advisement.
5. Opinion of the Court.
6. Judgment of the Court.
7. Order staying all proceedings until February Term.
8. Petition for rehearing.
9. Order on Petition for rehearing.
10. Motion for stay of mandate.
11. Order on motion for stay of mandate.
12. Motion asking leave to file Appellate Court Briefs, Statement of Jurisdiction of the Supreme Court of the United States, and Assignment of Errors.
13. Order on motion asking leave to file Appellate Court Briefs, Statement of Jurisdiction of the Supreme Court of the United States, and Assignment of Errors.
14. Bond.
15. Order approving bond.
16. All orders in the case made by the Court, and all other papers of record in the cause.
17. Præcipe for Record.
18. Certificate of Clerk of Supreme Court of Illinois.

A. W. Froehde, Attorney for Appellee.

Agreed: Leo Segall, Samuel M. Bloomberg, Attorneys for Appellant.

[fol. 44] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 16, 1938

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. [redacted] 20

J. O. STOLL,

Petitioner,

vs.

WILLIAM GOTTLIEB.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

ALBERT W. FROEHDE,
Counsel for Petitioner.

RUSSELL F. LOCKE,
Of Counsel.

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Table of Cases Cited.

ARTICLES OF THE CONSTITUTION AND STATUTES CITED.

(Extracts are Quoted in Appendix.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 920

J. O. STOLL,
Petitioner,
vs.
WILLIAM GOTTLIEB.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

Petition.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, J. O. Stoll, by his attorney, respectfully prays that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of Illinois (R. 68), being the highest court of said State, the opinion and decision of said court having been filed and entered of record on December 15, 1937 (R. 63), in the cause entitled *William Gottlieb, Appellant*, v. *S. A. Crowe, Jr., et al., (J. O. Stoll, Appellee)* (368 Ill. 88), Justice Wilson dissenting. A petition for rehearing was filed, and, after being entertained and considered by said court, was denied on

February 10, 1938 (R. 81), the opinion being then slightly modified and Justice Jones joining in the dissent. By this decision the said court reversed the judgment of the Appellate Court of Illinois, First District, rendered April 5, 1937 (R. 40), (289 Ill. App. 595), which latter judgment reversed a judgment of the Municipal Court of Chicago (R. 17). The judgment of the Municipal Court sustained a collateral attack on a decree of the United States District Court for the Northern District of Illinois, Eastern Division (R. 26), entered under Section 77-B of the Bankruptcy Act, and a collateral attack on two separate judgments (R. 36 and 38) of the said United States District Court on jurisdictional questions of Federal law.

Statement of Matter Involved.

Facts and Issues:

Respondent brought suit in the Municipal Court of Chicago against the petitioner upon mortgage bonds issued by a corporation and the guaranty thereof by the petitioner (R. 1).

Before this suit was brought, the bonds and guaranty had been cancelled and the respondent's rights had been determined by a plan of reorganization (R. 23) confirmed by a decree of the United States District Court for the Northern District of Illinois, Eastern Division (R. 26), in proceedings for reorganization of a corporation under Section 77-B of the Bankruptcy Act as amended.

Petitioner specially set up and claimed as a complete defense to this suit in the Municipal Court the proceedings in the Federal court which showed:

> that the guaranty had been cancelled and the respondents rights determined by the plan of reorganization (R. 8) and decree of the district court confirming the

plan (R. 9) in said proceedings in the district court (R. 7);

that the plan provided certain stock and cash for the holders of said bonds and guaranty sued upon by the respondent (R. 8);

that the respondent had been made a party to the proceedings in the district court by proper notice (R. 9); and,

furthermore, that the question of the power of the United States District Court to cancel the guaranty had been specifically determined by that court upon objection of other bondholders (R. 10).

After the petitioner had filed his defense in the Municipal Court of Chicago, the respondent filed in the United States District Court his petition to vacate the decree confirming the plan of reorganization directly challenging in the United States District Court the power of the district court to cancel a guaranty and determine his rights (R. 31), and the district court again decided in favor of its said power under Section 77-B of the Bankruptcy Act (R. 38), and refused to modify or vacate its decree confirming the plan of reorganization.

No appeal was taken from this decision (R. 38).

Petitioner then specially set up in the proceedings in the Municipal Court the further proceedings in the Federal court, and claimed as a further defense that the question of the power of the United States District Court was *res judicata* (R. 16).

The Municipal Court found the issues for the respondent, and entered judgment against the petitioner (R. 17).

Petitioner appealed to the Appellate Court of Illinois, First District, which court held that the question of power

of the Federal court was *res judicata*, and reversed the judgment of the trial court. One judge dissented (R. 44).

Respondent appealed to the Supreme Court of Illinois.

Rulings of the Supreme Court of Illinois:

The Supreme Court of Illinois held:

1. That a Federal court is without jurisdiction to cancel a guaranty while sitting in bankruptcy under Section 77-B for the reorganization of a debtor corporation (R. 66);

2. That the district court in this case was wholly without jurisdiction of the subject matter of this guaranty, and that that part of its decree which cancelled the guaranty was therefore void and subject to collateral attack (R. 66); and

3. That under the circumstances existing in this case, a judgment on a jurisdictional question of fact settles the question, but a judgment on a jurisdictional question of law is not binding on any other court (R. 67).

Two judges dissented.

The Supreme Court of Illinois refused to give full faith, credit and effect to the judgments of the United States District Court on the question of the power of the District Court; refused to give effect to the decree and plan of reorganization of the United States District Court; reversed the judgment of the Appellate Court of Illinois, and affirmed the judgment of the Municipal Court; thereby depriving the petitioner of a right or immunity specially set up and claimed under the Constitution and a statute of the United States.

Questions Presented:

The questions presented are:

A.

1. Are the judgments of a United States District Court, determining a jurisdictional question of Federal law, entitled to full faith, credit and effect in a State court; and

2. If so, is the jurisdictional question *res judicata* in a collateral action in a State court?

B.

1. Is a decree confirming a plan of reorganization of a corporation in proceedings under Section 77-B of the Bankruptcy Act, which, amongst other things, cancels a guaranty, absolutely void, in whole or in part, and subject to collateral attack?

There is no question of compliance with statutory jurisdictional requirements, jurisdiction of the persons, or jurisdiction of the proceedings under Section 77-B of the Bankruptcy Act. It is contended by the respondent that the United States District Court exceeded its power under the law.

Articles of the Constitution and Statutes Involved:

The Articles of the Constitution and the Statutes involved are listed below, and extracts thereof are set out in the Appendix:

Constitution, Article I, Sec. 8, Subsec. Fourth; (p. 24).
Article III, Sec. 2; (p. 24).
Article IV; (p. 24).
U. S. C., 1934, Title 11:
Ch. 1, Sec. 1 (8), p. 319 (p. 25).
Ch. 2, Sec. 11, p. 319 (p. 25).
Ch. 8, Sec. 206, p. 341 (Sec. 77-A, Bankruptcy Act) (p. 25).

Sec. 207 (a) p. 341 (Sec. 77-B (a) Bankruptcy Act) (p. 25).

Sec. 207 (b) p. 342 (Sec. 77-B (b) Bankruptcy Act) (p. 26).

Sec. 207 (g) p. 345 (Sec. 77-B (g) Bankruptcy Act) (p. 26).

Sec. 207 (j) p. 345 (Sec. 77-B (j) Bankruptcy Act) (p. 27).

Sec. 207 (o) p. 346 (Sec. 77-B (o) Bankruptcy Act) (p. 27).

Reasons Relied on for the Allowance of the Writ.

The Federal question raised by the refusal of the State Court to give full faith, credit and effect to the judgments and decree of the Federal court (*Phœnix Fire and Marine Insurance* v. *Temessee*, 161 U. S. 174, 185; *Chesapeake & Ohio Railway Co.* v. *McCabe*, 213 U. S. 207, 215; and *West Side Belt R. R. Co.* v. *Pittsburgh Construction Co.*, 219 U. S. 92, 99) was decided by the State court in a way probably not in accord with applicable decisions of this Court (*Supreme Lodge, Knights of Pythias* v. *Meyer*, 265 U. S. 30, 33; *Hancock National Bank* v. *Farnham*, 176 U. S. 640, 645; *Embry* v. *Palmer*, 107 U. S. 3, 9; *Dupasseur* v. *Rochereau*, 21 Wall. 130).

The State court held that the judgments of the district court on the question of the power of the district court were not binding on the State court, and the question determined by the district court was not *res judicata*. The far reaching effect of the principle involved in these proceedings was shown by this Court in *Johnson Co.* v. *Horton*, 152 U. S. 252, 257, where it was said that the peace and order of society demand adherence to the doctrine of *res judicata*. The decision of the State court on the controlling principle involved is probably not in accord with the decisions of this

Court in *Ex Parte Harding*, 219 U. S. 363, 369; *Dowell* v. *Applegate*, 152 U. S. 327, 340; and *Forsyth* v. *Hammond*, 166 U. S. 506, 515.

The State court held that a Federal court does not have power to cancel a guaranty under Section 77-B of the Bankruptcy Act. This Court has not determined the extent of the power of the Federal courts under Section 77-B of the Bankruptcy Act. This Court has held that bankruptcy proceedings are equity proceedings (*Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240); that proceedings under Section 77 of the Bankruptcy Act are proceedings in equity (*Continental Illinois National Bank and Trust Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 294 U. S. 648, 676); and that a guaranty may be cancelled in equity (*Louisville N. A. & C. Railway Co.* v. *Louisville Trust Co.*, 174 U. S. 552, 567). The State court has decided this question in a way probably not in accord with applicable decisions of this Court.

The State court held that the district court was wholly without jurisdiction of the subject matter of the guaranty, and that part of its decree was therefore void and subject to collateral attack. The State court's decision is probably not in accord with the decisions of this Court in *Ex Parte Harding*, 219 U. S. 363, 369, and *Dowell* v. *Applegate*, 152 U. S. 327, 340.

The decisions of the Federal court and a divided intermediate appellate court of Illinois are one way, and the decision of the trial court and a two-thirds majority of the Supreme Court of Illinois are the other. All the unfortunate possibilities of conflict and collision which might arise from these adverse decisions offer the strongest inducement for this Court to exercise its authority to finally settle the question (*Forsyth* v. *Hammond*, 166 U. S. 506, 515; *Ex Parte Harding*, 219 U. S. 363, 369).

Section 77-B of the Bankruptcy Act is a comparatively new remedial statute, the scope of which has not been determined by this Court. A great many reorganization plans, and decrees confirming them, involving large sums of money, property of great value, and many persons throughout the United States, have been, and are being collaterally attacked in the State courts. If this decision of the Supreme Court of Illinois stands unreversed and is followed hereafter, it will lead to great confusion and disregard for the judgments and decrees of the Federal courts. It opens the door to successful collateral attack on every plan, order and decree of the Federal courts in proceedings under Section 77-B of the Bankruptcy Act, with all the unfortunate consequences that must follow.

Wherefore, it is respectfully submitted that this prayer for a writ of certiorari to review the judgment of the Supreme Court of Illinois should be granted.

ALBERT W. FROEHDE,
Attorney for Petitioner.

RUSSELL F. LOCKE,
Of Counsel.

BRIEF.

Opinions Below.

The opinion of the Supreme Court of Illinois is reported in 368 Ill. 88, and appears in full beginning at page 63 of the Record filed herein. Justices Jones and Wilson dissented.

The opinion of the Appellate Court of Illinois, First District, is reported in 289 Ill. App. 595, and appears in full beginning at page 41 of the Record filed herein. Justice Matchett dissented.

Both opinions contain a statement of the facts and questions decided by the respective courts.

Jurisdiction of This Court.

This Court has jurisdiction of this cause under Section 237 (b) Judicial Code of the United States, as amended (28 U. S. C. A., Sec. 344 (b)).

The refusal of the State court to give full faith, credit and effect to the judgments and decree of the Federal court raised a Federal question (*Phoenix Fire and Marine Insurance* v. *Tennessee,* 161 U. S. 174, 185; *Chesapeake & Ohio Railway Co.* v. *McCabe,* 213 U. S. 207, 215; and *West Side Belt R. R. Co.* v. *Pittsburgh Construction Co.,* 219 U. S. 92, 99); and deprived the petitioner of a right or immunity specially set up and claimed under the Constitution and a statute of the United States. In this situation this court has jurisdiction (*Nutt* v. *Knut,* 200 U. S. 13, 18-19; *Pittsburgh &c Railway* v. *Loan & Trust Co.,* 172 U. S. 493, 507-510).

The State court construed the Bankruptcy Act and declared that the Federal court did not have power under

that act to put into effect the plan of reorganization involved, and therefore, that its decree was void and subject to collateral attack, thereby depriving the petitioner of a right or immunity specially set up and claimed under the Constitution and a statute of the United States. The determination of this Federal question by the State court brings this case within the jurisdiction of this Court (*California* v. *Deseret Water &c. Co.*, 243 U. S. 415, 417).

The petitioner, at the inception of this suit, filed a defense in the trial court in which he specially set up the proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, for the reorganization of a corporation under Section 77-B of the Bankruptcy Act (R. 7), including the plan of reorganization (R. 8), the decree confirming the plan of reorganization (R. 9), and the determination by the Federal court on two occasions (R. 10 and 16) of the question of the power of the Federal court, and claimed that the respondent was entitled only to that which was provided for him in the proceedings in the Federal court (R. 10).

The plan of reorganization and decree confirming it provided that the respondent should be entitled to certain stock and cash (R. 23), that the guaranty of the petitioner should be cancelled and surrendered in consideration for the transfer of all the assets of the debtor corporation to a new corporation and the surrender of the capital stock of the debtor (R. 23), and, further, that all claims and rights of the respondent be discharged and cancelled and the only rights of the respondent should be those accruing to him through the securities to be issued by the new corporation (R. 23).

The question of the power of the United States District Court to cancel the guaranty was specifically determined by the United States District Court upon objection of other bondholders by pleading, proof, hearing and judgment (R. 36). The same question was again determined by that

court upon the petition of the respondent, answer, hearing and judgment (R. 38).

The trial court refused to give full faith, credit and effect to the plan of reorganization, the decree confirming the plan, and the judgments of the district court on the question of the power of the district court; found the issues for the respondent (R. 17), overruled the petitioner's motion for a new trial (R. 17), to which exception was duly taken (R. 17), and entered judgment against the petitioner for the principal amount of the bonds and interest thereon (R. 17).

The petitioner appealed to the Appellate Court of Illinois, First District, which court held that the question of jurisdiction of the Federal court was *res judicata*, and therefore reversed the judgment of the trial court (R. 44).

The respondent appealed to the Supreme Court of Illinois, being the highest court of that State, upon leave granted; and contended that the decree confirming the plan of reorganization and cancelling the guaranty was void in that respect and subject to collateral attack (R. 53). The petitioner contended that the question of the power of the United States District Court was settled by the judgment of the United States District Court on that question, and, furthermore, that the United States District Court did have power to determine the rights of the respondent in the first instance (R. 57).

Practice in Illinois does not permit or require a formal assignment of errors.

The Supreme Court of Illinois held that the judgments of the Federal court on the question of the power of the Federal court were not binding on it (R. 67); proceeded to construe the Bankruptcy Act according to its conception of the law (R. 66); and held that the decree and plan of reorganization determining the rights of the respondent were void and subject to collateral attack (R. 68). The

Supreme Court refused to give effect to the plan of reorganization and decree confirming it, affirmed the judgment of the Municipal Court for the principal amount of the bonds and interest thereon (R. 17), and reversed the judgment of the Appellate Court, thereby depriving the petitioner of a right or immunity especially set up and claimed under the Constitution and a statute of the United States.

A petition for rehearing was filed, specifically requesting that full faith, credit and effect should be given to the judgments and decree of the Federal court (R. 70, 79), which, after being entertained and considered by said court, was denied on February 10, 1938.

Statement of the Case.

The facts in this case are set out in the opinions of the Supreme Court of Illinois (368 Ill. 88; R. 63), and the Appellate Court of Illinois, First District (289 Ill. App. 595; R. 41), and also in the Petition (pages 2-4).

This attack in the State court is a collateral second attack on the decree of the Federal court which determined the rights of the respondent, after an unsuccessful direct attack by the respondent, on the ground that the Federal court did not have power under the law to determine the rights of the respondent.

Specification of Assigned Errors.

The State court erred in its refusal and failure to give full faith, credit and effect to the plan of reorganization, decree and judgments of the Federal court which determined the rights of respondent, thereby depriving the petitioner of a right or immunity specially set up and claimed under the Constitution and a statute of the United States.

The State court erred in holding that the judgment of the United States District Court entered on the petition

of the respondent, deciding that it had power to enter the decree confirming the plan of reorganization, was not *res judicata* of this question of law.

The State court erred in holding that the district court was wholly without jurisdiction of the subject matter of said guaranty while sitting in bankruptcy under Section 77-B for the reorganization of a corporation, and that part of its decree was therefore void and subject to collateral attack.

Summary of Argument.

I. The judgments and decree of the United States District Court are entitled to full faith, credit and effect in the State court.

II. The question of the power of the Federal court under Section 77-B of the Bankruptcy Act is *res judicata*.

III. The decree of the Federal court under Section 77-B of the Bankruptcy Act, confirming the plan of reorganization, is not void in whole or in part and is not subject to collateral attack.

ARGUMENT.

I.

The judgments and decree of the United States District Court are entitled to full faith, credit and effect in the State court.

Section 77-B (j), Bankruptcy Act (U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (j), page 345) provides that a certified copy of the decree confirming a plan of reorganization or of any other decree or order shall be evidence of the jurisdiction of the court, and the fact that the decree or order was made. Certified copies of the decree confirming the plan of reorganization (R. 26) and of the pleadings and

judgment on the question of power of the Federal court were received in evidence in the State court (R. 31).

The Federal court expressly found that the debtor had complied with all the provisions of Section 77-B of the Bankruptcy Act (R. 28), and construed the Bankruptcy Act as authorizing the plan of reorganization in question, which determined the rights of the respondent. On two occasions it expressly passed on the question of its power under Section 77-B of the Bankruptcy Act, namely, when creditors of the same class raised the question (R. 36), and afterward when the respondent again raised the question (R. 38). This question was squarely put in issue and decided.

But the State court held that the judgments of the Federal court on the question of the power of the Federal court were not binding upon the State court and proceeded to construe the law according to its own conception.

The State court also refused to give effect to the plan of reorganization and decree confirming it. The plan provided for the organization of a new corporation, and that for each $100 of bonds issued by the debtor corporation there be issued to the owners thereof one share of common stock in the new corporation, together with the payment of certain overdue interest to the bondholders, and that the personal guaranty of the petitioner be cancelled and surrendered in consideration of the transfer of all the assets of said debtor to a new corporation and the surrender of the common stock of the debtor (R. 23); and provided further that all claims and rights of stockholders and creditors of the debtor upon the confirmation of the plan be discharged and cancelled, cease and terminate, and the only rights of said stockholders and creditors shall be those accruing to them in and through the securities to be issued by the new corporation (R. 23). The plan and decree further provided, in the language of Section 77-B (g), Bank-

ruptcy Act (U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (g), page 345) that "the provisions of the plan and the order of confirmation shall be and are binding upon • • • (3) all creditors, secured or unsecured, whether or not affected by the plan and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have, accepted" (R. 30). The State court utterly disregarded the provisions of the plan and decree confirming it, and the provisions of the statute, and entered judgment for the respondent against the petitioner for the principal amount of the bonds and interest thereon. The respondent was entitled only to that which was provided for him in the Federal court proceedings.

The proposition that the judgments and decrees of the United States District Courts are entitled to the same full faith, credit and effect in the State courts as the judgments of a sister State under Article IV of the Constitution of the United States, has been conclusively determined by this Court in the following cases:

Supreme Lodge, Knights of Pythias, v. *Meyer*, 265 U. S. 30, 33;

Hancock National Bank v. *Farnham*, 176 U. S. 640, 645;

Embry v. *Palmer*, 107 U. S. 3, 9;

Dupasseur v. *Rochereau*, 21 Wall. 130.

The State court failed and refused to give that full faith, credit and effect to the judgments and decree of the Federal court to which they are entitled.

II.

The question of the power of the Federal court under Section 77-B of the Bankruptcy Act is res judicata.

In this case, the Federal court on two occasions had passed on the question of its power, and had decided against the respondent. The Supreme Court of Illinois, in *Van*

Matre v. *Sankey*, 148 Ill. 536, 552, held that where a statute of a State has been given construction by the highest tribunal of the State, such construction will, ordinarily, in the courts of a sister State, be adopted as binding and conclusive, even though the examining court finds that upon similar language in a statute within their own sovereignty, they would place a different and even reverse construction.

The judgments of a Federal court must be given the same recognition in a State court as the judgments of a sister State. The Supreme Court of Illinois in the case now before this Court refused and failed to recognize the judgments of the Federal court on this question of the power of the Federal court under Section 77-B of the Bankruptcy Act.

The Supreme Court of Illinois went far out of its way to nullify the proceedings in the Federal court. In *Chamblin* v. *Chamblin*, 362 Ill. 588, 592, by unanimous opinion, it stated:

> "A court's jurisdiction having been once attacked, the former adjudication precludes the raising of the question again."

It is true that there was a jurisdictional question of fact involved in that case, instead of a jurisdictional question of law; but the same principle applies in either case. The reason given for a different ruling by the Supreme Court of Illinois in the present case, which involves a jurisdictional question of law, is that otherwise there would be no way by statute or constitution to limit the jurisdiction of the courts. Apparently, the court lost sight of the fact that adequate means are provided by statute for direct appeal from such a decision to a higher court where the matter may be finally determined. If an appeal is not taken, the decision of the jurisdictional question is binding on the parties.

This very question was settled by this Court in *Dowell* v. *Applegate*, 152 U. S. 327, 340 (Appendix, p. 21), referred to by this Court in *Ex Parte Harding*, 219 U. S. 363, 369 (Appendix, p. 21), as a leading authority. Also in the case of *Forsyth* v. *Hammond*, 166 U. S. 506, beginning at page 515 (Appendix, p. 22), this Court discusses the principle at some length. *Forsyth* v. *Hammond* involves the effect to be given a State court judgment on a jurisdictional question of law in a Federal court, but, nevertheless, the application of the principle is the same.

Inasmuch as the respondent selected the United States District Court as the forum for the trial of the same issue which he presented in this case, he is concluded by the final adjudication in the district court.

III.

The decree of the Federal court under Section 77-B of the Bankruptcy Act is not void in whole or in part and is not subject to collateral attack.

The doctrine that a court which has general jurisdiction over the subject matter and the parties to a cause is competent to decide questions arising as to its jurisdiction, and therefore that such decisions are not open to collateral attack, has been so often expounded by this Court that it may be taken as elementary and requiring no further reference to authority. (*Ex Parte Harding*, 219 U. S. 363, 369; *Dowell* v. *Applegate*, 152 U. S. 327, 337 to 340.)

Although the presumption in every stage of a cause in a District Court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record, yet, if such jurisdiction does not so appear, the judgment or final decree cannot, for that reason, be collaterally attacked, or treated as a nullity. (*Dowell* v. *Applegate*, 152 U. S. 327, 340.)

Whether the Federal court had power to determine the rights of the respondent in the proceedings under Section 77-B of the Bankruptcy Act was beyond the scope of the inquiry of the State court. When a judgment or decree of another court is presented as a complete defense to an action, the examining court may inquire into the jurisdiction of the court in which the original proceedings were had, and may examine the judgment or decree to determine its effect; but when the question of jurisdiction has previously been directly put in issue and decided, the examining court is bound by that decision. (*Ex Parte Harding*, 219 U. S. 363, 369; *Dowell* v. *Applegate*, 152 U. S. 327, 340; *Forsyth* v. *Hammond*, 166 U. S. 506, beginning at page 515.)

The cases cited in the opinion of the Supreme Court of Illinois involve only a *first* inquiry and determination of whether statutory jurisdictional requirements had been met, not a *second* collateral attack.

The rule in Illinois is that if the court under any circumstances had authority to enter such orders and judgments as it did enter, then its jurisdiction over the subject matter and the particular questions and circumstances involved and determined cannot be inquired into or attacked in a collateral proceeding. (*O'Connor* v. *Board of Trustees*, 247 Ill. 54, 57; *Balzer* v. *Pyles*, 350 Ill. 344, 349.)

The power of the Federal court in this case rests upon—

Article I, Section 8, Subsec. Fourth of the Constitution, which gives Congress power to establish laws on the subject of bankruptcy throughout the United States;

Article III, Section 2, of the Constitution, which provides that the judicial power shall extend to all cases in law or in equity arising under the Constitution and laws of the United States;

U. S. C. 1934, Title 11, Ch. 1, Sec. 1 (8), p. 319 (Bankruptcy Act Sec. 1 (8), which makes District Courts of the United States courts of bankruptcy;

U. S. C. 1934, Title 11, Ch. 2, Sec. 11, p. 319 (Bankruptcy Act Sec. 2), which vests the courts of bankruptcy with such power as may be necessary for the enforcement of the Bankruptcy Act;

U. S. C. 1934, Title 11, Ch. 8, Sec. 206, p. 341 (Sec. 77-A, Bankruptcy Act, which provides that the courts of bankruptcy shall have original jurisdiction in proceedings under Section 77-B of the Bankruptcy Act;

U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (a), p. 341 (Sec. 77-B (a), Bankruptcy Act, which provides that the court shall have and may exercise all powers which a Federal court would have had it appointed a receiver in equity;

U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (b), p. 341 (Sec. 77-B (b), Bankruptcy Act, which shows what provisions may be included in a plan of reorganization; and

U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (o), p. 345 (Sec. 77-B (o), Bankruptcy Act, which provides that the jurisdiction and powers of the court shall be the same as in voluntary bankruptcy proceedings.

This Court has held that bankruptcy proceedings are equity proceedings (*Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240); that proceedings under Section 77 of the Bankruptcy Act are proceedings in equity (*Continental Illinois National Bank and Trust Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 294 U. S. 648, 676); and that a guaranty may be cancelled in equity (*Louisville, N. A. & C. Railway Co.* v. *Louisville Trust Co.*, 174 U. S. 552, 567).

There is no fixed form that a plan of reorganization must take. The court of original jurisdiction must consider and

weigh all the rights and equities involved and if it finds the plan is fair, equitable and feasible, is proposed in good faith, and is in compliance with the provisions of subdivision (b) of Section 77-B of the Bankruptcy Act, it may, in the exercise of its equitable discretion, confirm the plan and make it binding upon all parties involved.

Conclusion.

The State court failed to give full faith, credit and effect to the judgments and decree of the Federal court. It decided an important question of Federal law not decided by this Court, in a way not in accord with applicable decisions of this Court. It opened the door to successful collateral attack on every plan, order and decree of the Federal courts in proceedings under Section 77-B of the Bankruptcy Act. If the proceedings of the Federal courts may be successfully attacked collaterally in the State courts, there will be no end to litigation and the result will be extreme uncertainty and confusion as to rights and privileges under the Constitution and statutes of the United States.

The petitioner respectfully submits that the judgment of the Appellate Court of Illinois, First District, should be affirmed and the judgment of the Supreme Court of Illinois should be reversed.

ALBERT W. FROEHDE,
Attorney for Petitioner.

RUSSELL F. LOCKE,
Of Counsel.

APPENDIX.

Excerpts from Cases Cited.

Ex Parte Harding, 219 U. S. 363, 369:

"The doctrine that a court which has general jurisdiction over the subject matter and the parties to a cause is competent to decide questions arising as to its jurisdiction, and therefore that such decisions are not open to collateral attack, has been so often expounded (see *Dowell* v. *Applegate*, 152 U. S. 327, 337 and cases cited) and has been so recently applied (*Hine* v. *Morse*, 218 U. S. 493), that it may be taken as elementary and requiring no further reference to authority."

Dowell v. *Applegate*, 152 U. S. 327, 340:

"These cases establish the doctrine that, although the presumption in every stage of a cause in a Circuit Court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record, *Börs* v. *Preston*, 111 U. S. 252, 255, and the authorities there cited, yet, if such jurisdiction does not so appear, the judgment or final decree cannot, for that reason, be collaterally attacked, or treated as a nullity.

"These authorities, above cited, it is said, do not meet the present case, because the ground on which, it is claimed, the federal court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court. As said in *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, above cited, if the Circuit Court

'kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal.' ".

Forsyth v. *Hammond*, 166 U. S. 506, 515:

"Coming now to the merits of the case it appears that on the pivotal question of the validity of the annexation proceedings the decision of the Supreme Court of the State is one way and that of the Court of Appeals directly the reverse. It is insisted by the plaintiff that the determination of the boundaries of a municipal corporation in the first instance, and any subsequent change in its boundaries by annexation of outside territory, are matters solely of legislative cognizance, and not judicial in their nature; that such is the general rule obtaining in the several States of the Union and up to the time of the decision of the Supreme Court of Indiana in this controversy, recognized in that State as elsewhere; that, therefore, the judicial proceedings in respect to this controversy in the courts of the State, culminating in the decision of its highest court, were beyond the jurisdiction of such courts, and not to be regarded as creating an adjudication binding upon other tribunals. * * *

But back of any criticism of the reasoning of the Supreme Court in its two opinions lies the fact of its decision. And here these things appear. The city of Hammond sought to bring within its limits, among other territory, the lands of plaintiff. After action by the

city council, the city instituted proceedings before the county commissioners, which proceedings were subsequently taken by appeal, as prescribed by statute, to the Circuit Court, a court of general jurisdiction, and in that court a decree was entered annexing plaintiff's lands to the City of Hammond. Were or were not these proceedings valid, and was or was not such decree a binding adjudication which neither the city nor the plaintiff could elsewhere dispute? That question certainly is one of a judicial nature. Now, it is no less a judicial function to consider whether those proceedings and that decree were valid and effective, and determine that they were and operated to annex plaintiff's territory to the city, than to enter upon a like consideration and determine that they were invalid and ineffective to make such annexation. The decision of the Supreme Court of Indiana was in favor of the validity, that of the Court of Appeals against their validity, and if it is judicial to hear and determine one way, it is likewise judicial to hear and determine the other. If action by the state tribunals stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the Supreme Court of the State to have that claim established. She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum and there challenged the decree of the Circuit Court, challenged it for error and also for lack of jurisdiction. The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal,

acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of *res judicata* have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions. *Cromwell v. Sac County*, 94 U. S. 351; *Lumber Co.* v. *Buchtel*, 101 U. S. 638; *Stout* v. *Lye*, 103 U. S. 66; *Nesbit* v. *Riverside Independent District*, 144 U. S. 610; *Johnson Co.* v. *Wharton*, 152 U. S. 252; *Last Chance Mining Co.*, 157 U. S. 683." (Italics ours.)

Articles of Constitution Involved.

Article I, Section 8, Subsec. Fourth of the Constitution vests Congress with the power "to establish * * * uniform laws on the subject of bankruptices throughout the United States."

Article III, Section 2, of the Constitution provides:

> "(First) The judicial power shall extend to all cases, in law or equity, arising under this Constitution, the laws of the United States, * * *"

Article IV, of the Constitution provides:

> "SECTION 1. Full faith and credit shall be given in each State to the public Acts, records and judicial proceedings of every other State. And the Congress may, by general laws prescribe the manner in which such Acts, records and proceedings shall be proved, and the effect thereof."

Statutes Involved.

U. S. C., 1934, Title 11, Ch. 1, Sec. 1 (8), p. 319 (Bankruptcy Act, Sec. 1 (8)):

"* * * 'courts of bankruptcy' shall include the district courts of the United States, * * *"

U. S. C., 1934, Title 11, Ch. 2, Sec. 11, P. 319 (Bankruptcy Act, Sec. 2):

"The courts of bankruptcy as defined in the previous chapter, namely the district courts of the United States in the several States, * * * are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as established on July 1, 1898, or as they may be thereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * *, to * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title; * * *"

U. S. C., 1934, Title 11, Ch. 8, Sec. 206, p. 341 (Sec. 77-A, Bankruptcy Act):

"In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, Courts of Bankruptcy shall exercise original jurisdiction in proceedings for relief of debtors as provided in Section 77-B of this Act."

U. S. C., 1934, Title 11, Ch. 8, Sec. 207 (a), p. 341, (Sec. 77-B (a) Bankruptcy Act):

"Any corporation which could become a bankrupt under Section 22 of this title, * * * may file an petition, * * * stating the requisite jurisdictional facts under this section; * * *. Upon the filing of such a petition or answer the judge shall enter an

order either approving it as properly filed under this section, if satisfied that such petition or answer complies with this section and has been filed in good faith, or dismissing it. If the petition or answer is so approved, * * * the court in which such order approving the petition or answer is entered * * * shall have and may exercise all the powers, not inconsistent with this section, which a federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature. * * *"

U. S. C., 1934, Title 11, Ch. 8, Sec. 207 (b), p. 342 (Sec. 77-B (b), Bankruptcy Act):

"A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character or otherwise; * * * (9) shall provide adequate means for the execution of the plan, which may include * * * the * * * modification of liens, indentures, or other similar instruments, the curing or waiving of defaults, * * * and the issuance of securities of either the debtor or any such corporation or corporations, * * * in exchange for existing securities, or in satisfaction of claims or rights, * * *. The term "claims" includes debts, securities, other than stock, liens or other interest of whatever character."

U. S. C., 1934, Title 11, Ch. 8, Sec. 207 (g) p. 345 (Sec. 77-B (g) Bankruptcy Act):

"Upon such confirmation the provisions of the plan and of the order of confirmation shall be binding upon (1) the debtor, (2) all stockholders thereof, including

those who have not, as well as those who have, accepted it, and (3) all creditors, secured or unsecured, whether or not affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it."

U. S. C., 1934, Title 11, Ch. 8, Sec. 207 (j), p. 345 (Sec. 77-B (j), Bankruptcy Act):

"A certified copy of the final decree or of an order confirming a plan of reorganization, or of any other decree or order entered in a proceeding under this section, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and the fact that the decree or order was made."

U. S. C., 1934, Title 11, Ch. 8, Sec. 207 (o), p. 345 (Sec. 77-B (o), Bankruptcy Act):

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 20

J. O. STOLL,

Petitioner,

vs.

WILLIAM GOTTLIEB.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR PETITIONER.

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Of Counsel.

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SUPREME COURT OF THE UNITED STATES

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BRIEF FOR PETITIONER.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Opinions Below.

The opinion of the Supreme Court of Illinois is reported in 368 Ill. 88, and appears in full beginning at page 63 of the Record filed herein. Justices Jones and Wilson dissented.

The opinion of the Appellate Court of Illinois, First District, is reported in 289 Ill. App. 595, and appears in full

beginning at page 41 of the Record filed herein. Justice Matchett dissented.

Both opinions contain a statement of the facts and questions decided by the respective courts.

Jurisdiction of This Court.

This Court has jurisdiction of this cause under Section 237 (b), Judicial Code of the United States, as amended (28 U. S. C. A., Sec. 344 (b)).

The refusal of the State court to give full faith, credit and effect to the judgments and decree of the Federal court raised a Federal question (*Phoenix Fire and Marine Insurance* v. *Tennessee*, 161 U. S. 174, 185; *Chesapeake & Ohio Railway Co.* v. *McCabe*, 213 U. S. 207, 215; and *West Side Belt R. R. Co.* v. *Pittsburgh Construction Co.*, 219 U. S. 92, 99); and deprived the petitioner of a right or immunity specially set up and claimed under the Constitution and a statute of the United States. In this situation this court has jurisdiction (*Nutt* v. *Knut*, 200 U. S. 13, 18-19; *Pittsburgh &c. Railway* v. *Loan & Trust Co.*, 172 U. S. 493, 507-510).

The State court construed the Bankruptcy Act and declared that the Federal court did not have power under that act to put into effect the plan of reorganization involved, and therefore, that its decree was void and subject to collateral attack, thereby depriving the petitioner of a right or immunity specially set up and claimed under the Constitution and a statute of the United States. The determination of this Federal question by the State court brings this case within the jurisdiction of this Court (*California* v. *Deseret Water &c. Co.*, 243 U. S. 415, 417).

The petitioner, at the inception of this suit, filed a defense in the trial court in which he specially set up the proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, for the reorganization

of a corporation under Section 77-B of the Bankruptcy Act (R. 7), including the plan of reorganization (R. 8), the decree confirming the plan of reorganization (R. 9), and the determination by the Federal court on two occasions (R. 10 and 16) of the question of the power of the Federal court, and claimed that the respondent was entitled only to that which was provided for him in the proceedings in the Federal court (R. 10).

The plan of reorganization and decree confirming it provided that the respondent should be entitled to certain stock and cash (R. 23), that the guaranty of the petitioner should be cancelled and surrendered in consideration for the transfer of all the assets of the debtor corporation to a new corporation and the surrender of the capital stock of the debtor (R. 23), and, further, that all claims and rights of the respondent be discharged and cancelled and the only rights of the respondent should be those accruing to him through the securities to be issued by the new corporation (R. 23).

The question of the power of the United States District Court to cancel the guaranty was specifically determined by the United States District Court upon objection of other bondholders by pleading, proof, hearing and judgment (R. 36). The same question was again determined by that court upon the petition of the respondent, answer, hearing and judgment (R. 38).

The trial court refused to give full faith, credit and effect to the plan of reorganization, the decree confirming the plan, and the judgments of the district court on the question of the power of the district court; found the issues for the respondent (R. 17), overruled the petitioner's motion for a new trial (R. 17), to which exception was duly taken (R. 17), and entered judgment against the petitioner for the principal amount of the bonds and interest thereon (R. 17).

The petitioner appealed to the Appellate Court of Illi-

nois, First District, which court held that the question of jurisdiction of the Federal court was *res judicata*, and therefore reversed the judgment of the trial court (R. 44).

The respondent appealed to the Supreme Court of Illinois, being the highest court of that State, upon leave granted; and contended that the decree confirming the plan of reorganization and cancelling the guaranty was void in that respect and subject to collateral attack (R. 53). The petitioner contended that the question of the power of the United States District Court was settled by the judgment of the United States District Court on that question, and, furthermore, that the United States District Court did have power to determine the rights of the respondent in the first instance (R. 57).

Practice in Illinois does not permit or require a formal assignment of errors.

The Supreme Court of Illinois held that the judgments of the Federal court on the question of the power of the Federal court were not binding on it (R. 67); proceeded to construe the Bankruptcy Act according to its conception of the law (R. 66); and held that the decree and plan of reorganization determining the rights of the respondent were void and subject to collateral attack (R. 68). The Supreme Court refused to give effect to the plan of reorganization and decree confirming it, affirmed the judgment of the Municipal Court for the principal amount of the bonds and interest thereon (R. 17), and reversed the judgment of the Appellate Court, thereby depriving the petitioner of a right or immunity specially set up and claimed under the Constitution and a statute of the United States.

A petition for rehearing was filed, specifically requesting that full faith, credit and effect should be given to the judgments and decree of the Federal court (R. 70, 79), which, after being entertained and considered by said court, was denied on February 10, 1938.

Petition for certiorari was filed in this Court April 2, 1938, and certiorari was granted May 16, 1938.

Statement of the Case.

The facts in this case are set out in the opinions of the Supreme Court of Illinois (368 Ill. 88; R. 63), and the Appellate Court of Illinois, First District (289 Ill. App. 595; R. 41), and also in the Petition (pages 2-4).

Facts and Issues:

Respondent brought suit in the Municipal Court of Chicago against the petitioner upon mortgage bonds issued by a corporation and the guaranty thereof by the petitioner (R. 1).

Before this suit was brought, the bonds and guaranty had been cancelled and the respondent's rights had been determined by a plan of reorganization (R. 23) confirmed by a decree of the United States District Court for the Northern District of Illinois, Eastern Division (R. 26), in proceedings for reorganization of a corporation under Section 77-B of the Bankruptcy Act as amended.

Petitioner specially set up and claimed as a complete defense to this suit in the Municipal Court the proceedings in the Federal court which showed:

> that the guaranty had been cancelled and the respondent's rights determined by the plan of reorganization (R. 8) and decree of the district court confirming the plan (R. 9) in said proceedings in the district court (R. 7);
>
> that the plan provided certain stock and cash for the holders of said bonds and guaranty sued upon by the respondent (R. 8);

that the respondent had been made a party to the proceedings in the district court by proper notice (R. 9); and,

furthermore, that the question of the power of the United States District Court to cancel the guaranty had been specifically determined by that court upon objection of other bondholders (R. 10).

After the petitioner had filed his defense in the Municipal Court of Chicago, the respondent filed in the United States District Court his petition to vacate the decree confirming the plan of reorganization directly challenging in the United States District Court the power of the district court to cancel a guaranty and determine his rights (R. 31), and the district court again decided in favor of its said power under Section 77-B of the Bankruptcy Act (R. 38), and refused to modify or vacate its decree confirming the plan of reorganization.

No appeal was taken from this decision (R. 38).

Petitioner then specially set up in the proceedings in the Municipal Court the further proceedings in the Federal court, and claimed as a further defense that the question of the power of the United States District Court was *res judicata* (R. 16).

The Municipal Court found the issues for the respondent, and entered judgment against the petitioner for the principal amount of the bonds and interest thereon (R. 17).

Petitioner appealed to the Appellate Court of Illinois, First District, which court held that the question of power of the Federal court was *res judicata*, and reversed the judgment of the trial court (R. 44).

Respondent appealed to the Supreme Court of Illinois.

Rulings of the Supreme Court of Illinois:

The Supreme Court of Illinois held:

1. That a Federal court is without jurisdiction to cancel a guaranty while sitting in bankruptcy under Section 77-B for the reorganization of a debtor corporation (R. 66);

2. That the district court in this case was wholly without jurisdiction of the subject matter of this guaranty, and that that part of its decree which cancelled the guaranty was therefore void and subject to collateral attack (R. 66); and

3. That under the circumstances existing in this case, a judgment on a jurisdictional question of fact settles the question, but a judgment on a jurisdictional question of law is not binding on any other court (R. 67).

The Supreme Court of Illinois refused to give full faith, credit and effect to the judgments of the United States District Court on the question of the power of the District Court; refused to give effect to the decree and plan of reorganization of the United States District Court; reversed the judgment of the Appellate Court of Illinois, and affirmed the judgment of the Municipal Court; thereby depriving the petitioner of a right or immunity specially set up and claimed under the Constitution and a statute of the United States.

Questions Presented:

The questions presented are:

A.

1. Are the judgments of a United States District Court, determining a jurisdictional question of Federal law, entitled to full faith, credit and effect in a State court; and

2. If so, is the jurisdictional question closed to further inquiry in a collateral action in a State court under the doctrine of *res judicata?*

B.

1. Is a decree confirming a plan of reorganization of a corporation in proceedings under Section 77-B of the Bankruptcy Act, which, amongst other things, cancels a guaranty, absolutely void, in whole or in part, and subject to collateral attack?

There is no question of compliance with statutory jurisdictional requirements, jurisdiction of the persons, or jurisdiction of the proceedings under Section 77-B of the Bankruptcy Act. It is contended by the respondent that the United States District Court exceeded its power under the law.

Articles of the Constitution and Statutes Involved:

The Articles of the Constitution and the Statutes involved are listed below, and extracts thereof are set out in the Appendix:

Constitution, Article I, Sec. 8, Subsec. Fourth; (p. 27).
Article III, Sec. 2; (p. 27).
Article IV; (p. 27).

U. S. C., 1934, Title 11:
Ch. 1, Sec. 1 (8), p. 319 (p. 28).
Ch. 2, Sec. 11, p. 319 (p. 28).
Ch. 8, Sec. 206, p. 341 (Sec. 77-A, Bankruptcy Act) (p. 28).
Sec. 207 (a), p. 341 (Sec. 77-B (a) Bankruptcy Act) (p. 28).
Sec. 207 (b), p. 342 (Sec. 77-B (b) Bankruptcy Act) (p. 29).

Sec. 207 (g), p. 345 (Sec. 77-B (g) Bankruptcy Act) (p. 29).
Sec. 207 (j), p. 345 (Sec. 77-B (j) Bankruptcy Act) (p. 30).
Sec. 207 (o), p. 346 (Sec. 77-B (o) Bankruptcy Act) (p. 30).

Specification of Assigned Errors.

The State court erred in its refusal and failure to give full faith, credit and effect to the plan of reorganization, decree and judgments of the Federal court which determined the rights of respondent, thereby depriving the petitioner of a right or immunity specially set up and claimed under the Constitution and a statute of the United States.

The State court erred in holding that the judgment of the United States District Court entered on the petition of the respondent, deciding that it had power to enter the decree confirming the plan of reorganization, did not settle the question between the parties.

The State court erred in holding that the district court was wholly without jurisdiction of the subject matter of said guaranty while sitting in bankruptcy under Section 77-B for the reorganization of a corporation, and that part of its decree was therefore void and subject to collateral attack.

Summary of Argument.

I. The State court proceeded first to declare that a Federal court is without jurisdiction to cancel a guaranty while sitting in bankruptcy under Section 77-B for the reorganization of a debtor corporation. It refused and failed to give full faith and credit to the judgments of the Federal court determining that question in this case, and refused to give effect to the plan of reorganization, decree of confirmation and said judgments.

The judgments, decree and plan of reorganization confirmed by the Federal court are entitled to full faith, credit and effect in the State court.

II. The State court then decided that the determination of a jurisdictional question of law, as distinguished from a jurisdictional question of fact, and particularly the determination by the Federal court in this case of whether or not it had power to cancel a guaranty, does not come within the doctrine of *res judicata*.

There is no authority for such a distinction. It is contrary to all authority and precedent. It would lead to an absurd result.

III. After having declared that the Federal court did not have jurisdiction of the subject matter of the guaranty, and having ruled that the determination of this same question of law by the Federal court was not binding on the parties, the State court held that that part of the plan of reorganization and decree confirming it which cancelled the guaranty was void and subject to collateral attack.

Even if the proceedings of the Federal court were erroneous, they were not void and subject to collateral attack.

ARGUMENT.

I.

The judgments and decree of the United States District Court are entitled to full faith, credit and effect in the State court.

Section 77-B (j), Bankruptcy Act (U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (j), page 345) (Appendix p. 30), provides that a certified copy of the decree confirming a plan of reorganization or of any other decree or order in proceedings under that section shall be evidence of the jurisdiction of the court, and the fact that the decree or order was made.

Certified copies of the decree confirming the plan of reorganization (R. 26) and of the pleadings and judgment on the question of power of the Federal court were received in evidence in the State court (R. 31).

The judgments and decrees of the United States District Courts are entitled to the same full faith, credit and effect in the State courts as the judgments of the courts of a sister State under Article IV of the Constitution of the United States.

Supreme Lodge, Knights of Pythias v. *Meyer*, 265 U. S. 30, 33;
Hancock National Bank v. *Farnham*, 176 U. S. 640, 645;
Embry v. *Palmer*, 107 U. S. 3, 9;
Dupasseur v. *Rochereau*, 21 Wall. 130;
Ambler v. *Whipple*, 139 Ill. 311, 323;
15 R. C. L. 989, Sec. 463.

There has been no dispute about the effect of the proceedings in the Federal court. The plan provided for the organization of a new corporation, and that for each $100 of bonds issued by the debtor corporation there be issued to the owners thereof one share of common stock in the new corporation, together with the payment of certain overdue interest to the bondholders, and that the personal guaranty of the petitioner be cancelled and surrendered in consideration of the transfer of all the assets of said debtor to a new corporation and the surrender of the common stock of the debtor (R. 23); and provided further that all claims and rights of stockholders and creditors of the debtor upon the confirmation of the plan be discharged and cancelled, cease and terminate, and that the only rights of said stockholders and creditors shall be those accruing to them in and through the securities to be issued by the new corporation (R. 23). The plan and decree further provided, in the language of Section 77-B (g), Bankruptcy Act (U. S. C. 1934,

Title 11, Ch. 8, Sec. 207 (g), page 345) (Appendix p. 29), that "the provisions of the plan and the order of confirmation shall be and are binding upon * * * (3) all creditors, secured or unsecured, whether or not affected by the plan and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have, accepted" (R. 30). The respondent was entitled only to that which was provided for him in the Federal court proceedings.

But the State court held that the Federal court was wholly without jurisdiction of the subject matter of the guaranty and that part of its order was therefore void (R. 66), and affirmed the judgment of the trial court against the petitioner for the principal amount of the bonds and interest thereon. The Federal court had expressly found, in the original proceedings, that the debtor had complied with all the provisions of Section 77-B of the Bankruptcy Act (R. 29), and construed the Bankruptcy Act as authorizing the plan of reorganization in question, which determined the rights of the respondent. On two other occasions it had expressly passed on the question of its power under Section 77-B of the Bankruptcy Act, namely, when creditors of the same class raised the question (R. 36), and afterward when the respondent again raised the question (R. 38). This question was squarely put in issue and decided. There was no appeal from these decisions. Even if the finding of compliance with all the provisions of Section 77-B of the Bankruptcy Act in the decree confirming the plan of reorganization be considered too general, or if the finding be considered a mere formal recital of jurisdiction, still, the two subsequent judgments by the Federal court on this same question of jurisdiction of the subject matter are also entitled to full faith, credit and effect in the State court.

The doctrine that a court which has general jurisdiction over the subject matter and the parties to a cause is com-

petent to decide questions arising as to its jurisdiction, and therefore that such decisions are not open to collateral attack, has been so often expounded by this Court that it may be taken as elementary and requiring no further reference to authority.

Ex Parte Harding, 219 U. S. 363, 369;
Dowell v. *Applegate,* 152 U. S. 327, 340;
Forsyth v. *Hammond,* 166 U. S. 506, 517;
Rew v. *Sioux City Independent School District,* 125 Iowa, 28, 34; 98 N. W. 802, 804;
Chicago Title & Trust Company v. *National Storage Co.,* 260 Ill. 485, 494.

The respondent, of his own volition, invoked the jurisdiction of the Federal court to decide the question of its power, and invoked the jurisdiction of the Federal court to vacate or modify its decree. If the Federal court, upon the petition of the respondent; had decided its decree confirming the plan of reorganization exceeded its power and was void, it had jurisdiction to decide the question that way, and it had jurisdiction to vacate or modify the decree if it was found to be void. And if it had jurisdiction to determine its decree was void, as the respondent prayed in his petition, it must have jurisdiction to determine it was not void. Its decision had to be one way, or the other. Having that jurisdiction, its decision, whether correct or not, is binding on the respondent until reversed in a direct proceeding, and is not subject to collateral attack.

The effect of the determination by the Federal court of the question of jurisdiction of the subject matter is to preclude the State court from inquiry into the same question, under the doctrine of *res judicata.*

The State court failed and refused to give that full faith, credit and effect to the judgments and decree of the Federal court to which they are entitled.

II.

The question of the power of the Federal Court under Section 77-B of the Bankruptcy Act was settled by the Federal court, under the doctrine of res judicata.

In this case, the Federal court on two occasions had passed on the question of its power, and had decided against the respondent. There was no appeal from those decisions.

The Supreme Court of Illinois went far out of its way to nullify the proceedings in the Federal court.

In *Van Matre* v. *Sankey*, 148 Ill. 536, 552, it held that where a statute of a State has been given construction by the highest tribunal of the State, such construction will, ordinarily, in the courts of a sister State, be adopted as binding and conclusive, even though the examining court finds that upon similar language in a statute within their own sovereignty, they would place a different and even reverse construction.

The judgments of a Federal court must be given the same recognition in a State court as the judgments of the courts of a sister State.

In *Chamblin* v. *Chamblin*, 362 Ill. 588, 592, by unanimous opinion, the Illinois Supreme Court stated;

> "A court's jurisdiction having been once attacked, the former adjudication precludes the raising of the question again."

In the present case, however, it held that the determination of a jurisdictional question of law does not preclude the raising of the question again (R. 67). No authority is cited to support the attempted distinction, and the petitioner is unable to find any that does. The reason given for the ruling is that otherwise there would be no way by statute or constitution to limit the jurisdiction of the courts. Apparently, the court lost sight of the fact that adequate means are pro-

vided by statute for appeal from such a decision to a court of competent appellate jurisdiction where the original decision may be reviewed, and, if necessary, may be corrected. The respondent in this case did not appeal.

If any party chooses to go no further according to law, the decision must be binding upon him. Otherwise, utter confusion would result. No reliance could be placed upon any judgment. Every judgment would be subject to collateral attack, even if jurisdiction of the subject matter had been specifically determined, as in this case. If not satisfied with the decision of one or more courts, either party could continue to bring suit until a court was found that would decide as desired. And, under the attempted distinction from the rule, we see no reason why even that decision would be final. The matter could go on *ad infinitum*.

This court settled this proposition in *Dowell* v. *Applegate*, 152 U. S. 327, 340 (Appendix p. 24), referred to by this Court in *Ex Parte Harding*, 219 U. S. 363, 369 (Appendix p. 24), as a leading authority. Also in the case of *Forsyth* v. *Hammond*, 166 U. S. 506, beginning at page 515 (Appendix p. 25), this court discusses and follows the same principle. *Forsyth* v. *Hammond* involves the effect to be given a State court judgment on a jurisdictional question of law in a Federal court, but, nevertheless, the application of the principle is the same. Another well-reasoned case involving a conclusion of law is *Rew* v. *Sioux City Independent School District*, 125 Iowa 28, 30 to 37, 98 N. W. 802, 803 to 805. The same situation arises in connection with removal of causes from the State courts to the Federal courts. Such cases are:

Chesapeake & Ohio Railway Co. et al. v. *McCabe*, 213 U. S. 207, 220;

Des Moines Nav. & R. Co. v. *Iowa Homestead Co.*, 123 U. S. 552, 559;

Bolen-Darnell Coal Company v. *Kirk*, 25 Okla. 273, 276, 106 Pac. 813, 814, 26 L. R. A. (N. S.) 270.

The State courts have no right to review or control the exercise of jurisdiction by the Federal courts and a Federal judgment sustaining its own jurisdiction cannot be ignored in a State court as one absolutely void. Such a judgment, until reversed by a proper proceeding, is binding on the parties, and must be given force and effect when set up in an action in a State court.

Inasmuch as the respondent selected the United States District Court as the forum for the trial of the same issue of law which he presented in this case, he is concluded by the final adjudication in the Federal court.

III.

The decree of the Federal court under Section 77-B of the Bankruptcy Act is not void in whole or in part and is not subject to collateral attack.

Having declared that the Federal court did not have jurisdiction of the subject matter of the guaranty, and having ruled that the determination of this same question of law by the Federal court was not binding on the parties, the State court held that that part of the plan of reorganization and decree confirming it which cancelled the guaranty was void and subject to collateral attack (R. 68).

The rule in Illinois is that if the court under any circumstances had authority to enter such orders and judgments as it did enter when its jurisdiction over the subject matter and the particular questions and circumstances involved and determined cannot be inquired into or attacked in a collateral proceeding. (*O'Connor* v. *Board of Trustees*, 247 Ill. 54, 57; *Balzer* v. *Pyles*, 350 Ill. 344, 349.)

The authority of the Federal court in this case rests upon:

Article I, Section 8, Subsec. Fourth of the Constitution, (Appendix p. 27) which gives Congress power to establish

laws on the subject of bankruptcy throughout the United States;

Article III, Section 2, of the Constitution, (Appendix p. 27) which provides that the judicial power shall extend to all cases in law or in equity arising under the Constitution and laws of the United States;

U. S. C. 1934, Title 11, Ch. 1, Sec. 1 (8), p. 319 (Bankruptcy Act, Sec. 1 (8)) (Appendix p. 28), which makes District courts of the United States courts of bankruptcy;

U. S. C. 1934, Title 11, Ch. 2, Section 11, p. 319 (Bankruptcy Act, Sec. 2), (Appendix p. 28), which vests the courts of bankruptcy with such jurisdiction at law and in equity as may be necessary for the enforcement of the Bankruptcy Act;

U. S. C. 1934, Title 11, Ch. 8, Sec. 206, p. 341 (Sec. 77-A, Bankruptcy Act) (Appendix p. 28), which provides that the courts of bankruptcy shall have original jurisdiction in proceedings under Section 77-B of the Bankruptcy Act;

U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (a), p. 341 (Sec. 77-B (a), Bankruptcy Act) (Appendix p. 28), which provides that the court shall have and may exercise all powers which a Federal court would have had it appointed a receiver in equity;

U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (b), p. 342 (Sec. 77-B (b), Bankruptcy Act) (Appendix p. 29), which shows what provisions may be included in a plan of reorganization; and

U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (o), p. 346 (Sec. 77-B (o), Bankruptcy Act) (Appendix p. 30), which provides that the jurisdiction and powers of the court shall be the same as in voluntary bankruptcy proceedings.

Cancellation of instruments is not wholly beyond the jurisdiction of the Federal courts. The Federal court is not so wholly lacking in any color of authority that its action

may be declared a nullity by a court not having competent appellate jurisdiction.

This Court has held that bankruptcy proceedings are equity proceedings (*Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240); that proceedings under Section 77 of the Bankruptcy Act are proceedings in equity (*Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 294 U. S. 648, 676); and that a guaranty may be cancelled in equity (*Louisville, N. A. & C. Railway Co.* v. *Louisville Trust Co.*, 174 U. S. 552, 567). It has been held that the decree of a district court of the United States, cancelling a forged marriage contract, may be used to stay the enforcement of judgments for property rights recovered upon such contract in a subsequent suit in a State court. (*Sharon* v. *Terry*, 36 Fed. 337, 351). Another case involving the cancellation of instruments is *Thompson* v. *Emmett Irrigation District*, 227 Fed. 560, 565.

The State court relies upon *In re Diversey Building Corporation*, 86 F. (2d) 456; *Nine North Church Street, Inc.*, 82 F. (2d) 186; and *Armstrong* v. *Obucino*, 300 Ill. 140; as authorities for its declaration that the Federal court was wholly without jurisdiction of the subject matter of the guaranty, and its ruling that part of the order confirming the plan of reorganization was therefore void (R. 66). But that question was not properly before the State court. The Federal court had decided that question in this case, and that decision of the Federal court is binding on the parties.

Furthermore, the U. S. Circuit Court of Appeals, in *In re: Diversey Building Corporation*, 86 F. (2d) 456, was careful to say at the end of its opinion in that case:

> "It must be understood that this opinion is applicable only to the facts as here presented."

There is no sweeping declaration in that case, nor in any other, that the United States District Court in proceedings

for reorganization under Section 77-B of the Bankruptcy Act may not confirm such a plan as the one involved herein under all the facts and circumstances presented herein.

In *In re Nine North Church Street, Inc.*, 82 F. (2d) 186, (C. C. A. 2), the appellants held certificates of beneficial interest in a group of bonds issued by various corporations, which certificates were guaranteed by Maryland Casualty Company. The court expressly says, at page 189 of the opinion:

> "But there is no obligation running from the debtor to the appellants and the appellants are not seeking to interfere with the debtor's property. They are enforcing a personal right against Maryland. * * * *The question would be different if the appellants held the debtor's bonds.* But the appellants here are certificate holders, not creditors of this debtor." (Italics ours.)

Since the appellants were not creditors of the debtor, the court had no jurisdiction over them nor over their claims. The opinion clearly shows that the decision rested upon the fact that there was no obligation from the debtor to the appellants, and gives the unmistakable inference that if the appellants had held the debtor's bonds the decision would have been different.

The case of *Armstrong* v. *Obucino*, 300 Ill. 140, has no application here. That case involved a direct attack in the State court of original jurisdiction on proceedings under the provisions of the State's law providing for mechanic's liens, on account of failure to comply with the statute in the proceedings. It did not involve a collateral second attack in a court of another sovereignty, or jurisdiction, after the question had been determined in the court of original jurisdiction, as in this case. There is no failure to comply with the statute in this case.

On the other hand, in *In re 1775 Broadway Corporation*, 79 F. (2d) 108, 110 (C. C. A. 2), the Circuit Court of Appeals

expressly held that in a 77-B reorganization proceeding the court might, as a part of the reorganization plan, and after being satisfied that it was fair and just so to do, release the trustee under the mortgage bond issue from a claim of personal liability for mismanagement of the trust.

In the case of *In re Central Funding Corporation*, 75 F. (2d) 256 (C. C. A. 2nd), the plan of reorganization released the guarantor. The approval of this plan and the affirmance of the order of confirmation by the Circuit Court of Appeals, indicates clearly, that in their opinion the court below has the power and the jurisdiction to modify an existing guaranty in a reorganization proceeding.

The test apparently is simply whether the court exercised its discretion properly and judiciously in approving the particular plan of reorganization. There is no fixed form that a plan of reorganization must take. The court of original jurisdiction must consider and weigh all the rights and equities involved, and if it finds, as it did in this case, that the plan is fair, equitable and feasible, is proposed in good faith, and is in compliance with the provisions of subdivision (b) of Section 77-B of the Bankruptcy Act, it may confirm the plan and make it binding upon all parties involved.

The State court cites *Demilly* v. *Grosrenaud*, 201 Ill. 272; *Rabbitt* v. *Weber & Co.*, 297 Ill. 491; *Ashlock* v. *Ashlock*, 360 Ill. 115, as authority for the proposition that the proceedings in the Federal court with reference to the guaranty are void and subject to collateral attack (R. 68). Those cases involve domestic judgments in special statutory proceedings, namely, appeal from a justice of the peace, attachment, and adoption proceedings, respectively, in which there was a failure to show strict compliance with the necessary statutory jurisdictional requirements. In the present case there is no failure whatever to comply with the statute. In those cases the questions of compliance depended upon matters of fact. The law in Illinois with reference to collateral attack

based upon jurisdictional matters of fact is settled in the case of *Chamblin* v. *Chamblin*, 362 Ill. 588, 592; which was reaffirmed in this case as to jurisdictional matters of fact. Those cases do not discuss, or rule on, the question of a collateral second attack on a judgment in another jurisdiction after an unsuccessful first attack in the original jurisdiction where the question of jurisdiction of the subject matter was previously specifically decided. *O'Connor* v. *Board of Trustees*, 247 Ill. 54, also cited as authority for the State court's ruling, sustains the position of the petitioner in this case.

The courts of the United States, though of limited jurisdiction, are not on that account inferior courts in the technical sense, whose judgments, taken alone, are to be disregarded. Such courts stand upon the same footing as courts of record of general jurisdiction and all the presumptions which are indulged in favor of superior tribunals of general jurisdiction are equally extended to the courts of the United States. Their judgments cannot be impeached for error or irregularity in a collateral proceeding; they can be vacated only on motion in the courts in which they are rendered, or reversed for error in an appellate jurisdiction:

McCormick v. *Sullivant*, 10 Wheat. 192, 199;
Des Moines Nav. & R. Co. v. *Iowa Homestead Co.*, 123 U. S. 552, 558;
Edelstein v. *U. S.* (C. C. A., 8th, 1906), 149 Fed. 636, 638;
In re First Natl. Bank of Belle Fourche (C. C. A., 8th, 1907), 152 Fed. 64, 70;
Henderson et al. v. *Denious* (C. C. A. 8th, 1911), 186 Fed. 100, 105;
Reed v. *Vaughan*, 15 Mo. 137, 141;
15 R. C. L. 886, Sec. 364.

Even if erroneous, the proceedings of the Federal court were not void and subject to collateral attack.

The State court says in its opinion that "jurisdiction of the subject matter cannot be conferred by consent, is not waived by appearance, and may be raised at any time. *Town of Kingston* v. *Anderson*, 300 Ill. 577; *Rabbitt* v. *Weber & Co., supra*" (R. 68). That rule does not apply under the facts of this case. It may apply in a case where the question of jurisdiction of the subject matter has not been litigated and determined. There is not the slightest suggestion in this record that jurisdiction of the subject matter was conferred by consent or depends upon any appearance. In this case the question of jurisdiction of the subject matter under the law was raised in the Federal court, was litigated there, and finally determined by that court. The rule that does apply was stated by the Supreme Court of Illinois in *Chamblin* v. *Chamblin*, 362 Ill. 588, 592:

> "A court's jurisdiction having been once attacked the former adjudication precludes the raising of the question again."

and by this court in:

Ex Parte Harding, 219 U. S. 363, 369;
Dowell v. *Applegate*, 152 U. S. 327, 340;
Forsyth v. *Hammond*, 166 U. S. 506, 517.

Conclusion.

The State court failed to give that full faith, credit and effect to the judgments and decree of the Federal court to which they are entitled.

The question of jurisdiction having been determined by the Federal court upon the petition of the respondent, its decision is binding on the parties under the doctrine of *res judicata*, and must be given force and effect in the State court.

The proceedings in the Federal court are not a nullity and subject to collateral attack.

The judgment of the Supreme Court of Illinois is contrary to important fundamental principles of law and should be reversed, and the judgment of the Appellate Court of Illinois, First District, should be affirmed.

ALBERT W. FROEHDE,
Attorney for Petitioner.

ALBERT W. FROEHDE AND
RUSSELL F. LOCKE,
Of Counsel.

APPENDIX.

Excerpts from Cases Cited.

Ex Parte Harding, 219 U. S. 363, 369:

"The doctrine that a court which has general jurisdiction over the subject matter and the parties to a cause is competent to decide questions arising as to its jurisdiction, and therefore that such decisions are not open to collateral attack, has been so often expounded (see *Dowell* v. *Applegate*, 152 U. S. 327, 337 and cases cited) and has been so recently applied (*Hine* v. *Morse*, 218 U. S. 493), that it may be taken as elementar, and requiring no further reference to authority."

Dowell v. *Applegate*, 152 U. S. 327, 340:

"These cases establish the doctrine that, although the presumption in every stage of a cause in a Circuit Court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record, *Börs* v. *Preston*, 111 U. S. 252, 255, and the authorities there cited, yet, if such jurisdiction does not so appear, the judgment or final decree cannot, for that reason, be collaterally attacked, or treated as a nullity.

"These authorities, above cited, it is said do not meet the present case, because the ground on which it is claimed, the federal court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court. As said in *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, above cited, if the Circuit Court

'kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity.' To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal.' ".

Forsyth v. *Hammond*, 166 U. S. 506, 515:

"Coming now to the merits of the case it appears that on the pivotal question of the validity of the annexation proceedings the decision of the Supreme Court of the State is one way and that of the Court of Appeals directly the reverse. It is insisted by the plaintiff that the determination of the boundaries of a municipal corporation in the first instance, and any subsequent change in its boundaries by annexation of outside territory, are matters solely of legislative cognizance, and not judicial in their nature; that such is the general rule obtaining in the several States of the Union and up to the time of the decision of the Supreme Court of Indiana in this controversy, recognized in that State as elsewhere; that, therefore, the judicial proceedings in respect to this controversy in the courts of the State, culminating in the decision of its highest court, were beyond the jurisdiction of such courts, and not to be regarded as creating an adjudication binding upon other tribunals. * * *

But back of any criticism of the reasoning of the Supreme Court in its two opinions lies the fact of its decision. And here these things appear. The city of Hammond sought to bring within its limits, among other territory, the lands of plaintiff. After action by the

city council, the city instituted proceedings before the county commissioners, which proceedings were subsequently taken by appeal, as prescribed by statute, to the Circuit Court, a court of general jurisdiction, and in that court a decree was entered annexing plaintiff's lands to the City of Hammond. Were or were not these proceedings valid, and was or was not such decree a binding adjudication which neither the city nor the plaintiff could elsewhere dispute? That question certainly is one of a judicial nature. Now it is no less a judicial function to consider whether those proceedings and that decree were valid and effective, and determine that they were and operated to annex plaintiff's territory to the city, than to enter upor a like consideration and determine that they were invalid and ineffective to make such annexation. The decision of the Supreme Court of Indiana was in favor of the validity, that of the Court of Appeals against their validity, and if it is judicial to hear and determine one way, it is likewise judicial to hear and determine the other. If action by the state tribunals stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the Supreme Court of the State to have that claim established. She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum and there challenged the decree of the Circuit Court, challenged it for error and also for lack of jurisdiction. The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another

tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of *res judicata* have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions. *Cromwell* v. *Sac County*, 94 U. S. 351; *Lumber Co.* v. *Buchtel*, 101 U. S. 638; *Stout* v. *Lye*, 103 U. S. 66; *Nesbit* v. *Riverside Independent District*, 144 U. S. 610; *Johnson Co.* v. *Wharton*, 152 U. S. 252; *Last Chance Mining Co.*, 157 U. S. 683." (Italics ours.)

Articles of Constitution Involved.

Article I, Section 8, Subsec. Fourth of the Constitution vests Congress with the power "to establish * * * uniform laws on the subject of bankruptcies throughout the United States."

Article III, Section 2, of the Constitution provides:

> "(First) The judicial power shall extend to all cases, in law or equity, arising under this Constitution, the laws of the United States, * * *"

Article IV, of the Constitution provides:

> "SECTION 1. Full faith and credit shall be given in each State to the public Acts, records and judicial proceedings of every other State. And the Congress may, by general laws prescribe the manner in which such Acts, records and proceedings shall be proved, and the effect thereof."

Statutes Involved.

U. S. C., 1934, Title 11, Ch. 1, Sec. 1 (8), p. 319 (Bankruptcy Act, Sec. 1(8)):

> "* * * 'courts of bankruptcy' shall include the district courts of the United States, * * *"

U. S. C., 1934, Title 11, Ch. 2, Sec. 11, P. 319 (Bankruptcy Act, Sec. 2):

> "The courts of bankruptcy as defined in the previous chapter, namely the district courts of the United States in the several States, * * * are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as established on July 1, 1898, or as they may be thereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * *, to * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title; * * *"

U. S. C., 1934, Title 11, Ch. 8, Sec. 206, p. 341 (Sec. 77-A, Bankruptcy Act):

> "In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, Courts of Bankruptcy shall exercise original jurisdiction in proceedings for relief of debtors as provided in Section 77-B of this Act."

U. S. C., 1934, Title 11, Ch. 8, Sec. 207 (a), p. 341, (Sec. 77-B (a) Bankruptcy Act):

> "Any corporation which could become a bankrupt under Section 22 of this title, * * * may file an original petition, * * * stating the requisite jurisdictional facts under this section; * * *. Upon the filing of such a petition or answer the judge shall enter an order either approving it as properly filed under

this section, if satisfied that such petition or answer complies with this section and has been filed in good faith, or dismissing it. If the petition or answer is so approved, * * * the court in which such order approving the petition or answer is entered * * * shall have and may exercise all the powers, not inconsistent with this section, which a federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature. * * *"

U. S. C. 1934, Title 11, Ch. 8, Sec. 207 (b), p. 342 (Sec. 77-B (b), Bankruptcy Act):

"A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character or otherwise; * * * (9) shall provide adequate means for the execution of the plan, which may include * * * the * * * modification of liens, indentures, or other similar instruments, the curing or waiving of defaults, * * * and the issuance of securities of either the debtor or any such corporation or corporations, * * * in exchange for existing securities, or in satisfaction of claims or rights, * * *. The term "claims" includes debts, securities, other than stock, liens or other interest of whatever character."

U. S. C., 1934, Title 11, Ch. 8, Sec. 207 (g) p. 345 (Sec. 77-B (g) Bankruptcy Act):

"Upon such confirmation the provisions of the plan and of the order of confirmation shall be binding upon (1) the debtor, (2) all stockholders thereof, including those who have not, as well as those who have, accepted it, and (3) all creditors, secured or unsecured, whether

or not affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it."

U. S. C., 1934, Title 11, Ch. 8, Sec. 207 (j), p. 345 (Sec. 77-B (j), Bankruptcy Act):

"A certified copy of the final decree or of an order confirming a plan of reorganization, or of any other decree or order entered in a proceeding under this section, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and the fact that the decree or order was made."

U. S. C., 1934, Title 11, Ch. 8, Sec. 207 (o), p. 346 (Sec. 77-B (o), Bankruptcy Act):

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved."

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 20

J. O. STOLL,
Petitioner,

vs.

WILLIAM GOTTLIEB,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENT.

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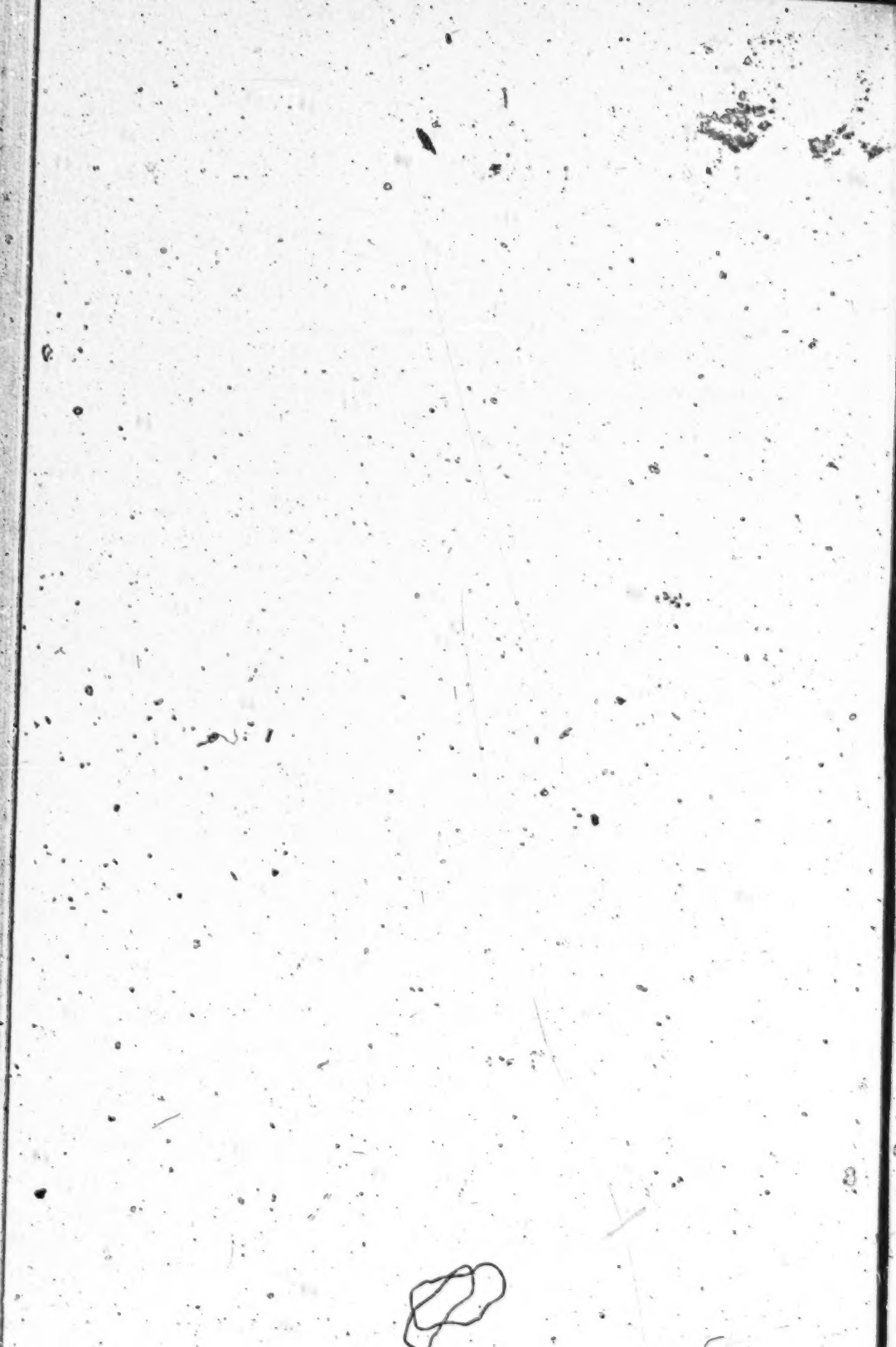

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BRIEF FOR RESPONDENT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW.

The opinion of the Supreme Court of Illinois is reported in 368 Ill. 88, and appears in full beginning at page 63 of the Record filed herein.

The opinion of the Appellate Court of Illinois, First District, is reported in 289 Ill. App. 595, and appears in full beginning at page 41 of the Record filed herein.

Both opinions contain a statement of the facts and questions decided by the respective courts.

JURISDICTION OF THIS COURT.

Respondent concedes without argument that this Honorable Court has jurisdiction of this cause and gladly submits all questions appertaining thereto for decision.

STATEMENT OF THE CASE.

The facts in this case are set out in the opinion of the Supreme Court of Illinois (368 Ill. 88; R. 63) and the Appellate Court of Illinois, First District (289 Ill. App. 595; R. 41).

Questions Presented:

According to respondent's theory of this case, the questions presented are:

A.

1. To what degree of faith, credit and effect in a State Court is the judgment or decree of a United States District Court, sitting in bankruptcy under Section 77B of the Bankruptcy Act for the reorganization of a debtor corporation entitled, if entered without jurisdiction and power and in violation of the said Act?

2. Can the question of jurisdiction and power of such court be inquired into in a collateral action in a State Court under the "full faith and credit" clause of the Constitution of the United States?

B.

1. Is a decree confirming a plan of reorganization of a corporation in proceedings under Section 77B of the Bankruptcy Act, which, amongst other things cancels a guaranty, absolutely void in whole or in part and therefore subject to collateral attack?

SUMMARY OF ARGUMENT.

I. The Supreme Court of Illinois did not refuse and did not fail to give that degree of full faith and credit to the judgment of the Federal Court to which it was entitled.

A. Under the "full faith and credit" clause of the Constitution of the United States, the question of jurisdiction and power was rightfully and properly inquired into by the Supreme Court of Illinois.

II. The Supreme Court of Illinois rightfully declared that the Federal Court did not have jurisdiction of the subject matter of the guaranty and rightfully held that that part of the plan of reorganization and decree confirming it which cancelled the guaranty was void and subject to collateral attack.

ARGUMENT.

I.

The Supreme Court of Illinois did not refuse and did not fail to give that degree of full faith and credit to the judgment and decree of the Federal Court to which it was entitled.

It is true that this court has said that judicial proceedings of a federal court must be accorded the same full faith and credit by state courts as would be required in respect of the judicial proceedings of another state. However, it cannot be denied that if the judicial proceedings of another state are void because the court exceeded its jurisdiction and power, then the courts of Illinois could and should refuse to give credit to same. This refusal would be just and proper even if that court did determine that it had jurisdiction and power and proceeded wrongfully. It is hardly believable that the "full faith and credit" clause would impose an absolute duty on a state court to abide by the judicial proceedings of a federal court that are void and be bound by them regardless of the consequences.

15 R. C. L. 929-932, Sec. 408 (Appendix, p. 32).

In approving a state court's inquiry on a judgment of a federal court, this court held in *Dupasseur* v. *Rochereau*, 88 U. S. 130, on page 135, that the state court did not refuse to accord due force and effect to the judgment of the federal court by ignoring it; that the judgment could not have any greater force or effect than

judgments in the state courts rendered under like circumstances.

A. Under the "full faith and credit" clause of the Constitution, the question of jurisdiction and power of the Federal Court to cancel the guaranty was rightfully and properly inquired into by the Supreme Court of Illinois.

Section 1 of Article IV of the Federal Constitution concerning "full faith and credit" does not forbid inquiry as to the federal court's power to cancel the guaranty or as to the jurisdiction of that court over the person or in respect to the subject matter.

Reynolds v. *Stockton*, 140 U. S. 254.
Pennoyer v. *Neff*, 95 U. S. 714, 727, 729.
Thompson v. *Whitman*, 85 U. S. 457.
Harris v. *Hardeman*, 14 How. (U. S.) 334.
D'Arcy v. *Ketchum*, 11 How. (U. S.) 165.
Williamson v. *Berry*, 8 How. (U. S.) 495, 540.
Christmas v. *Russell*, 5 Wall. (U. S.) 290.
Rose v. *Himely*, 4 Cranch (U. S.) 269.
15 R. C. L. 929-932, Sec. 408.
15 R. C. L. 990, Sec. 463.

In *Thompson* v. *Whitman*, *supra*, on page 469, this court said,

> "on the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provisions of the Fourth Article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

Petitioner cites several cases and one text on page 11 of his brief to support the proposition to which respondent

agrees that judgments of the federal courts are entitled to the *same* full faith, credit and effect in the state courts as the judgments of the courts of a sister state under Article IV of the Constitution. However, in *Knights of Pythias* v. *Meyer*, 265 U. S. 30, it was held that a decree of a federal court in Indiana was not binding in the state court of Nebraska. This case supports respondent's contention that a judgment of a federal court is never absolute but can always be inquired into and disregarded.

Hancock National Bank v. *Farnham*, 176 U. S. 640, also limits the meaning of the "faith and credit" clause. On page 644, this court stated in referring to an attack on the decree of the federal court of Kansas that "the only defences which he can make against it are those which he could make in the courts of Kansas." It cannot be denied therefore that respondent had the right to question the jurisdiction and power of the federal court to cancel the guaranty because under no circumstances could this particular guaranty be cancelled in any court in view of the provisions of the Bankruptcy Act.

In 15 R. C. L. 989, Sec. 463 cited by petitioner, it is stated on page 990 that,

> "proceedings of the United States Courts may be inquired into by the state courts for the purpose of seeing whether the federal courts had jurisdiction or authority to render such judgment or decree," (citing several cases),—"and also whether the executory proceedings *under it have been conformable to law.*" (Italics ours.)

To the same effect—*Adams* v. *Terrell*, 4 Fed. 796, 800, 801.

In *Harrington* v. *People*, 6 Barbour (N. Y.) 607, the court held (1) that the jurisdiction of a court, whether of a general or limited jurisdiction, may be inquired into,

although the record of the judgment states facts giving it jurisdiction; (2) *that no court can acquire jurisdiction by the mere assertion of it.*

II.

The proceedings in the United States District Court and the decree cancelling the guaranty herein do not constitute an estoppel by verdict nor is the judgment res judicata.

A. In estoppel by verdict, the court entering the order decree or judgment set up as an estoppel must have the power and jurisdiction to so enter the order decree or judgment if it would be binding on the parties in subsequent litigation.

Miller v. *Rowan*, 251 Ill. 344, 348.
Munroe v. *People*, 102 Ill. 406, 409, 410.
Okon v. *Kaenas, et al.*, 222 Ill. App. 45, 48.

The reasoning of the court as to its powers is less regarded than the judgment and decree itself and the premises which it necessarily affirms. This court must therefore look into the federal court's decree and orders for the proper decision of this cause.

Deke v. *Huenkemeier*, 289 Ill. 148, 154.
Pennoyer v. *Neff*, 95 U. S. 714, 727.

In *Okon* v. *Kaenas, et al., supra*, where a court in foreclosure proceedings entered a money decree and gave credit to the defendant for money paid to the original holder of the note and upon suit by the same plaintiff against the same defendant to recover the money credited in the foreclosure suit, it was held the plea of *res judicata* bad for the reason that the suit upon the note was an action *in personam*, while the foreclosure proceedings

was a suit *in rem*, that the court had no *power* to enter a money decree and credit defendant for money paid to original holder of the note. Cited case and the one at bar are quite analogous. The proceedings in the District Court in this case was one *in rem* for the purpose of reorganizing the "debtor" corporation and *for this alone* did the court have jurisdiction and power.

B. Motion of ~~petitioner~~ respondent in the Federal Court to vacate the decree and orders cancelling the guaranty entered almost two years prior thereto for the reason that that court had no power and jurisdiction in that reorganization proceeding under Section 77B of the Bankruptcy Act to so cancel the guaranty, did not confer validity upon that part of the decree otherwise void.

The opinion of the majority of the Justices of the Appellate Court of Illinois which petitioner seeks to affirm cite the case of *Chamblin* v. *Chamblin*, 362 Ill. 588, to support the proposition that ~~petitioner~~ respondent cannot now complain because the question of the power of the District Court to cancel the guaranty was once put in issue by this motion and the order of the District Court bars him forever. However, the case cited and misapplied, is one involving the law pertaining to jurisdiction *over the person* and *not jurisdiction over the subject matter* as in the case at bar. The facts in the *Chamblin* case and the distinction between it and the case at bar are set forth in the opinion of the Supreme Court of Illinois. (R. 67.)

The doctrine of *res adjudicata* can always be applied to a former adjudication if there is a finding that the court has jurisdiction over the person and in *fact* does have jurisdiction over the subject matter and such is the

case cited. The question of jurisdiction over the *subject matter* was never questioned in the *Chamblin* case but it is questioned in the case at bar and *that question must be settled in this proceeding. It is absolutely necessary to go into the question of the power of the Federal Court to cancel the guaranty because if no power can be shown, then there is no estoppel nor res adjudicata.* The Appellate Court's opinion was in substance an avoidance of the real issue in this case which is not necessarily the issue of estoppel and *res adjudicata* but one of jurisdiction over the subject matter of the guaranty. This issue the Supreme Court of Illinois recognized and rightfully ruled that the federal court had no such jurisdiction. *Moreover, the validity of every judgment depends upon the jurisdiction of the court before it is rendered and not upon what may occur subsequently.*

Pennoyer v. *Neff*, 95 U. S. 714, 727.

In *Goudy* v. *Hall*, 30 Ill. 109, the Supreme Court says on p. 116,

> "But upon the question of the right of the court to act upon the persons or rights of parties, we think there is great propriety in holding that the *finding of the court is not conclusive.*"

To the same effect is *Adams* v. *Terrell*, 4 Fed. 796, 800, 801. Even if an attack upon the jurisdiction of the federal court were made therein, it still can be proved at any time and at any place by reference to the laws of the United States that the federal court did not have jurisdiction of the subject matter of the guaranty and did not comply with Section 16(a) of the Bankruptcy Act.

103 A. S. R. 307, 309.

In *Brougham* v. *Oceanic Steam Navigation Co.*, 205 Fed. 856, 859, 860, the court said,

> "It is sometimes said that every court has jurisdiction to determine its own jurisdiction. A court must as an incident to its general power to administer justice have authority to consider its own right to hear a cause. *But the mere decision by a court that it has such right when it does not exist does not give it authority.* A court by moving in a cause assumes authority *but assumption does not confer it.*
>
> The jurisdiction of a court depends upon its right to decide a case and never upon the merits of its decision. When a court makes an order in a cause over which it has no jurisdiction, it is a nullity. Similarly, if a court have jurisdiction of a cause and yet make an order in it beyond its power, the order is void. In the one case there is action without authority; in the other, action in excess of authority. In both cases, the order is a nullity. *Ex Parte* Fisk, 113 U. S. 713; *In re* Sawyer, 124 U. S. 200." (Italics ours.)

Petitioner on pages 13 and 15 of his brief cites several cases to support the doctrine that a court which has *general jurisdiction over the subject matter* is competent to decide questions as to its jurisdiction, and therefore such decisions are not open to collateral attack. This doctrine begs the very issue in question, the issue as to the federal court's jurisdiction and power over the subject matter of this guaranty. In *Ex Parte* Harding, 219 U. S. 363, the question was whether the judgment of a federal court declining to remand a case to a State Court from which it was removed was reviewable by mandamus; in other words, that that writ may *be used to subserve the purpose of an appeal.* This court held that jurisdiction has been given to the federal court to determine whether the cause is one for removal and therefore denied the writ. *There was no question involved therein*

pertaining to collateral attack or jurisdiction over the subject matter but the only question, the exercise of judicial discretion. However, this court did distinguish therein the case of *Virginia* v. *Rives*, 100 U. S. 313, wherein a writ of mandamus did issue because the federal court abused its discretion disclosed by the power attempted to be exerted and impliedly held that no appeal would be necessary.

In *Dowell* v. *Applegate*, 152 U. S. 327, this court held that in removing the cause from the state court, the federal court rightfully assumed jurisdiction and did have jurisdiction over the issues and the subject matter of the deeds in question. This case and the *Harding* case involve findings of jurisdictional facts for removal and not questions of jurisdiction over the subject matter.

In *Forsyth* v. *Hammond*, 166 U. S. 506, this court held invalid an attack in a Federal Circuit Court of Appeals upon a decision of the Indiana Supreme Court in a matter that was peculiarly within the domain of state control, to be finally and absolutely determined by that Supreme Court. Indiana Supreme Court held that the lower court in that instance had jurisdiction over the subject matter pertaining to territorial boundaries of a municipal corporation. Likewise, state courts cannot deny the correctness of a ruling of this Honorable Court in construing Section 77B of the Bankruptcy Act but *what is there to prevent a state court from ignoring a decree or order of a lower federal court in construing this section when such state court is aided and guided by decisions of Federal Circuit Courts of Appeal and which it follows.*

Rew v. *School District*, 125 Iowa 28 and *Chicago Title and Trust Co.* v. *Storage Co.*, 260 Ill. 485 involve the doctrine of estoppel by verdict where the issues decided

were the identical in both courts and where the courts had jurisdiction over the subject matter.

In the removal cases cited on page 15 of petitioner's brief, the federal courts have jurisdiction over the subject matters and the only questions involved pertain to the legal effect of the facts for removal and the discretion of the court in permitting or refusing removal.

III.

The Bankruptcy Act prohibits the cancellation of a guaranty and there is no authority in Section 77B of that act as amended or elsewhere giving the Federal Court, while sitting in bankruptcy under Section 77B for reorganizing a "debtor" corporation, power and jurisdiction to cancel a guaranty.

A. The Pertinent Statutes and cases in point.

Section 16(a) of the Bankruptcy Act prohibits and Section 77B does not authorize, alteration of rights against third party guarantors. Section 16(a) provides that:

> "The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

Section 77B(b) provides that:

> "A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, (10) may deal with *all or any part of the property of the debtor and* may include any other appropriate provisions not inconsistent with this section."

The rights of creditors here referred to are rights against the debtor in reorganization, not rights against

parties other than such debtor. The property to be dealt with is the property of the debtor in reorganization, not property of parties other than such debtors. Section 77B (h) provides that "the final decree shall discharge the debtor from *its* debts and liabilities * * *." Clearly the only debts that may be discharged are debts of the debtor in reorganization, *not debts of parties other than such debtor.* Section 77B (k) provides that all other provisions of the Bankruptcy Act not inconsistent with Section 77B shall apply thereto, and Section 77B (o) provides that *jurisdiction under 77B shall be the same as that which results from a voluntary petition and adjudication in bankruptcy.*

It thus appears that Section 77B does not contain any provisions that might authorize alteration of rights against third party guarantors, which rights are *expressly* preserved in Section 16(a). Indeed, Section 77B, which relates to corporate debtors exclusively, does not even contain provisions analogous to Section 76, which, in relation to individual debtors, *extends* the obligation of the guarantor to correspond to the extension granted to the individual debtor liable for the debt guaranteed. Section 76 merely *extends* the guaranty but does not *cancel* it which the District Court had no power to do in the case at bar. Section 76 of the Bankruptcy Act relative to the extension of the guaranty does not apply to Section 77B proceedings and has no relation to any situation that may be created under them. *In re Hygrade Dye Works, Inc.*, C. C. H. Dec., Sec. 3083.

Nor is Section 77B inconsistent with Section 16(a). The additional jurisdiction "for the relief of debtors" to be exercised under Section 77B, and conferred by Section 77A, is limited to the relief of debtors *in* reorganization. It does not extend to the relief of a guarantor of

obligations of such a debtor, or to the relief of a guaranty of obligations upon which he is primarily and personally liable. Accordingly, Section 77B, which does not purport to affect rights against third party guarantors not in reorganization, cannot be inconsistent with Section 16(a) which preserves such rights. Both sections can and should be given full effect. Repeals by implication are not favored.

Continental Bank v. *Rock Island Ry.*, 294 U. S. 648, 670, 672, (holding that Section 77B is strictly a law on bankruptcy).

United States v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, 396.

General Motors, etc., Corp. v. *United States*, 286 U. S. 49, 61.

Frost v. *Wenie*, 157 U. S. 46, 58.

Delaware Tribe of Indians v. *United States*, 84 Ct. Cl. 535.

It may be said that bankruptcy proceedings are equitable in their nature but they are to be administered in accordance with the Bankruptcy Act and general orders and *not under any broad unlimited equity power.*

Bardes v. *Bank*, 178 U. S. 524, 535, 20 Sup. Ct. 1005, 44 L. Ed. 1175.

In re Judith Gap Commercial Co., 5 F. (2d) 307, 309.

Johnson v. *Norris*, 190 F. 459, L. R. A. 1915—13,884.

Westall v. *Avery*, 171 F. 626.

Woods-Drury, Inc. v. *Superior Court*, 63 P. (2d) 1184.

City Real Estate Co. v. *Realty Const. Corp.*, 3 N. Y. S. (2d) 312.

They are confined to controversies relating to a bankrupt estate and within this limited area.

Southern Bell Telephone & Tel. Co. v. *Caldwell, et al.*, (C. C. A. 8) 67 F. (2d) 802.

Sessler v. *Nemoof*, 183 F. 656.

Central Fibre Products Co. v. *Bacher*, 112 S. W. (2d) 372, 376 (Mo.) Nov. 15, 1937.

In has been held that bankruptcy courts under the act have no jurisdiction of independent suits at law or in equity. *Maryman* v. *S. G. Dreyfus Co.*, 174 S. W. 549 (Ark.). In *Bush* v. *Elliott*, 202 U. S. 479, 26 Sup. Ct. 670, 50 L. Ed. 1114, it was held that it was the evident purpose of Congress to limit the jurisdiction of the federal courts sitting in bankruptcy in respect to controversies which did not even come *simply* within the jurisdiction of those courts. To the same effect are *Bardes* v. *Bank, supra; In re Smith*, 7 F. Supp. 863, 864 and *In re Hageman*, 10 F. Supp. 716.

Petitioner on page 18 of his brief cites *Continental Bank* v. *Rock Island Ry. Co.*, 294 U. S. 648, to support the proposition that proceedings under Section 77 of the Bankruptcy Act are proceedings in equity. The question therein was whether the bankruptcy court in reorganizing a debtor railroad had the power to enjoin the sales of bonds held by five banks as security for collateral notes of the railway company, if such sales would so hinder, obstruct and delay the consummation of a plan of reorganization as probably to prevent it. This court found that the bankruptcy court had *statutory* authority to issue the injunction and the injunction goes no further than *to delay* the enforcement of the contract. Would it then follow from the case that the bankruptcy court had the further equitable power, if it so desired to act, to *cancel* the contract as it has attempted to do in this case before the bar? Surely constitutional limitations prevent this!

Petitioner cites *Louisville, etc., Railway Co.* v. *Louisville Trust Co.*, 174 U. S. 552, to support his contention that

a guaranty may be cancelled in equity. There was no question involved as to the power of the *federal court in equity* to cancel the guaranty. Furthermore this court stated on page 577 that it had the power to cancel the guaranty *only* as to purchasers with notice. It is therefore apparent that even a court of equity with plenary powers cannot cancel a guaranty, which cancellation would affect those without notice of the defect as well as those with notice. Furthermore the cases are not analogous, inasmuch as the case at bar does not involve a general court of equity but a bankruptcy court with limited equitable powers.

In *Sharon* v. *Terry and Thompson* v. *Irrigation District*, petitioner's brief, page 18, the federal court as a *court of equity* had the power to cancel a forged marriage contract and to remove a cloud upon the title of personal property. The case at bar involves a bankruptcy court and not an equity court so the cited cases are not applicable. There is nothing in the record to show that the District Court did indicate any provision in Section 77B upon which its jurisdiction and power to cancel the guaranty might be based. *There is none.* The District Court has no power to enter the decree cancelling the guaranty which did nullify Section 16(a). *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204. Congress did not give the power and this is apparent by its silence. It is even true that Section 77B does not even give jurisdiction to the District Court over property of the bankrupt which it holds in trust for a third party. *In re Commonwealth Bond Corp., Debtor*, 77 Fed. (2d) 308. That court when sitting in bankruptcy is none the less a separate and distinct court, and exercising powers and jurisdiction *separate and distinct* from its powers and jurisdiction as a district court. *Norris* case, 18 F. Cas. No. 10,304.

B. The Constitutional Question.

The Constitutional question involved in the extension of Section 77B jurisdiction beyond property of the debtor has been noted by the court in *In re Commonwealth Bond Corporation*, 77 Fed. (2d) 308, 309. If Section 77B may be so construed as to empower the District Court to cancel the Guaranty, it would violate the Fifth Amendment which provides: "* * * nor shall any person * * * be deprived of * * * property without due process of law."

Louisville, etc., Bank v. *Radford*, 295 U. S. 555, 589, 601.

C. The District Court sitting in bankruptcy under Section 77B of the Bankruptcy Act for reorganizing a "debtor" corporation was a court of limited jurisdiction and power, that is, limited in respect to the subject matter over which it may exercise jurisdiction.

Wheeling Structural Steel Co. v. *Moss*, 62 F. (2d) 37.

Chicago Bank of Commerce v. *Carter*, 61 F. (2d) 986, 988.

Nixon v. *Michaels*, 38 F. (2d) 420, 423.

In re Stearns, 295 F. 833.

Finn v. *Carolina Portland Cement Co.*, 232 F. 815 (C. C. A.).

In re Hollins, 229 F. 349.

Nelson v. *Sven, etc.*, 178 F. 136, 140.

Henrie v. *Henderson*, 145 F. 316, 319.

Remington on Bankruptcy, 3rd Ed. (III).

1. A Federal Court cannot have the power to enter a decree or order except when authority is found in the

Constitution of the United States and statutes made pursuant thereto. *The People* v. *Seelye*, 146 Ill. 189, 221; *State of Rhode Island* v. *Massachusetts*, 12 Pet. (U. S.) 657, 720; *Munroe* v. *People*, 102 Ill. 406, 409; *Jones* v. *Kansas City, etc., Co.*, 1 F. (2d) 649, (C. C. A.); Collier on Bankruptcy, 13th Ed., Vol. 1, p. 42. The District Court's powers are limited by the language of the Bankruptcy Act. *Chicago Bank of Commerce* v. *Carter, supra; In re Converse-Hough & Co., Inc.*, 27 F. (2d) 368, 369; *Nierman* v. *Industrial Commission*, 329 Ill. 623, 627. Power not conferred by that act it does not possess. *Adams* v. *Terrell*, 4 F. 796, 801 (holding proceedings of a bankruptcy court subject to collateral attack) and see cases cited therein.

The test in determining whether the District Court had the power to cancel the guaranty is whether that court, under the circumstances, would have authority to enter such decrees and orders cancelling the guaranty. *O'Connor* v. *Board of Trustees*, 247 Ill. 54, 57. It is obvious that under Section 16(a) of the Bankruptcy Act, it had no such authority: there is no authority in Section 77B, nor is there authority in equity to cancel the guaranty.

Congress, by enacting Section 16(a) of the Bankruptcy Act, providing that the discharge in bankruptcy of a principal debtor shall not release the guarantor, and by remaining silent as to that point in Section 77B, appears to have clearly manifested its intention that controversies not strictly or properly part of the proceedings in bankruptcy, but independent suits upon the guaranty, should not come within the power of the District Court.

2. The District Court in decreeing the Cancellation of the Guaranty did not comply with the Bankruptcy Act and that part of the decree is a nullity.

The District Court did not act judicially in all things before it. It transcended the power conferred by the Bankruptcy Act. It could not be conceded that if the action were upon a money demand, the court notwithstanding its complete jurisdiction over the subject and the parties, has power to pass judgment of imprisonment upon the defendant. *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 281; *Windsor* v. *McVeigh*, 93 U. S. 274, 282. So much of the decree of the District Court as was in excess of its powers is void.

The general language of Section 77B of the Bankruptcy Act, although broad, cannot be held to apply to the guaranty because the question pertaining to the cancellation of the guaranty is *specifically* dealt with in Section 16 (a) of the Bankruptcy Act. *United States* v. *Chase*, 135 U. S. 255, 260. The specific terms of Section 16 (a) prevail over the general terms in Section 77B. *Kepner* v. *United States*, 195 U. S. 100, 125. The plain mandate of Section 16 (a) cannot be set aside because of consideration which may appeal to the referee or judge as falling within general principles of equity jurisprudence. *Burton Coal Co.* v. *Franklin Coal Co.*, 67 F. (2d) 796.

D. Under the decisions in In re Diversey Building Corporation, 86 Fed. (2d) 456, wherein this court denied a petition for certiorari, 300 U. S. 662, No. 636, and In re Nine North Church St., Inc., 82 Fed. (2d) 186, 188, and other cases cited herein, the Federal Court was wholly without jurisdiction of the subject matter of this guaranty, and its orders and decree pertaining to the cancellation of the guaranty are absolutely void and subject to collateral attack.

The leading cases on this point, those cited above, state point blank and *without equivocation, or reservation,* that

a Federal Court is without jurisdiction to cancel a guaranty while it is sitting in Bankruptcy under Section 77B for the reorganization of a "debtor" corporation.

The facts in the *Diversey Bldg. Corp. case* are as follows: On June 28, 1935, the District Court of the United States, entered a decree consummating the reorganization of the Diversey Bldg. Corporation. The plan contemplated the release of Becklenberg from his guarantee of the bond issue. On October 16, 1935, the debtor filed its petition for a restraining order in the District Court to restrain and enjoin on Weber and other creditors from prosecuting their suits at law or in equity against Becklenberg on his guaranty. Weber, in his answer to the petition, alleged a denial of the Court's jurisdiction to restrain him from proceeding against Becklenberg. The court, however, entered a perpetual restraining order enjoining Weber and other creditors from prosecuting their lawsuits against Becklenberg from which order Weber and others appealed. The appellants did not accept the plan and from the decree of June 28, 1935, there was no appeal.

The Circuit Court of Appeals of the same circuit wherein this case at bar was decided states in its opinion:

> "The question here presented is whether the District Court had the power to release Becklenberg from his guaranty of the old bond issue in consideration of his guaranty of the new bond issue, pursuant to the reorganization plan which had been approved by the court after its acceptance by two-thirds in amount of the allowed and effected claims of each class of creditors, but which had not been accepted by appellants, who were bondholders of the original issue.
>
> This question must be answered in the negative • • • the trouble here is that the court exceeded its jurisdiction with respect to the subject matter before it."

The court further states in its opinion that it is in accord with the conclusions expressed in the *Nine North Church Street case* where the facts are very similar.

The Circuit Court of Appeals in the *Nine North Church Street* case held specifically that the obligation arising by virtue of the guaranty are not affected by the reorganization of the debtor; that any modification of the guaranty can only be justified by the bankruptcy power which extends only to the relief of insolvent and hard pressed debtors; that the guarantor cannot modify its obligations by the reorganization of other insolvents; that Section 16 (a) of the Bankruptcy Act expressly reserving a creditor's rights against the guarantor of a discharged bankrupt's debts, shows that an alteration of the guarantor's liability is not conceived to be essential to the debtor's reorganization; that the District Court had no jurisdiction to enjoin suit on the guaranty and *was without jurisdiction as to claims against the guarantor.*

See:

In the Matter of Utilities Power and Light Corp., Debtor, 91 F. (2d) 598.

In re Prudence Bonds Corp., 79 Fed. (2d) 212, 215.

In re 1775 Broadway Corporation, 79 Fed. (2d) 108, 110.

Brumley v. *Jones,* 141 F. 318.

Collier Supp. Sec. 77B; Am. B. R. Digest, Sec. 1279-a).

The Supreme Court of Illinois has gone very far in upholding the principles for which a guaranty stands. In the case of *Holm* v. *Jamieson,* 173 Ill. 295, 300, a corporate note was declared by a court of equity void for want of authority of the treasurer of the corporation to execute the same. The holder sued the guarantor and this

court held that the action of the court of equity holding note void does not release the absolute guarantor and the plea setting up the decree is bad. This was a collateral attack on the judgment of another court which actually did have jurisdiction of the subject matter.

The New York Court of Appeals on July 13, 1937, went even further than the cases cited above. In *Union Trust Co. of Rochester* v. *Willsea*, 275 N. Y. 164, 9 N. E. (2d) 820, there was an action on a guaranty of payment executed and delivered by appellant to respondent of the indebtedness of the Willsea Works, a corporation which filed its petition for reorganization under Section 77B. In the proceeding in the federal court, respondent creditor filed its claim against the principal debtor which represented the same indebtedness as set up in the complaint against appellant-guarantor and actively participated in the proceedings therein and even accepted 915 shares of stock under the confirmed plan of reorganization.

It was urged by the guarantor that the acceptance of that stock and the participation by the creditor in the proceedings constituted full payment of the guaranty. *The court however held that no matter what actions the creditor did take, still there could be no payment by virtue of the reorganization proceedings and the federal court has no jurisdiction to adjudge that the claim was by the proceedings paid and discharged; that the proceedings under Section 77B involved the debtor and its creditors and did not in any way affect the independent guaranty agreement; that such proceeding is subject to all other applicable provisions of the Bankruptcy Act.* The court points out that no provisions of the act are referred to it whereby a guarantor of a debt of the bankrupt is relieved of liability as the result of a proceeding under Section 77B, unless such guarantor has himself been

adjudicated not liable in a proceeding instituted by or against him as a result of his own insolvency.

In a very recent case decided August 28, 1937 in the District Court, S. D. of New York, it was held that a bankruptcy court in reorganization of a corporation has no power to issue injunctions against suits in other courts involving an insurance company in which the debtor owns stock, even though the institution of such suits or proceedings may have an adverse effect on assets of the debtor, the court reasoned therein that the insurance company was not in reorganization. *In re Madison Mortgage Corporation,* 22 F. Supp. 99.

See *Chauncey, et al.* v. *Dykes Bros., et al.,* (C. C. A. 8) 119 F. 1, 3, wherein it was held that the bankruptcy act, confers no such authority on the court to assume jurisdiction of a controversy between third parties, merely because the claimants happened to be creditors of the bankrupt estate. *In re Pyrocolor Corp.,* 46 F. (2d) 554.

In *In re 1775 Broadway Corporation, supra,* which petitioner inadvertently misquoted on page 19 of his brief, the Circuit Court of Appeals held that provisions of a plan releasing trustee of tort claims against it were properly disapproved by the district court especially *since that court did not have jurisdiction* of non-assenting noteholders to release tort claims and since claims were not against debtor or its assets or such as were required to be settled in order to bring the property into the reorganized company.

Petitioner is now attempting to convince this Honorable Court that the decision of the Appellate Court of Illinois for the First District, First Division was correct and that the decision of the Supreme Court of Illinois was

incorrect. The Appellate Court in this case stated through Mr. Justice O'Connor:

> "In this state of the record, we would not be warranted in disturbing the judgment of the District Court in this collateral proceeding *unless it was clear that the District Court was wholly without jurisdiction and this we are unable to say.*" (Italics ours.) (R. 44.)

However, this doubt referred to no longer exists, because in the case of *Johnson* v. *Finn*, 14 N. E. (2d) 240, decided April 25, 1938, the same Appellate Court held:

> "A guaranty of payment of the issue of corporation's bonds was not in any way affected, discharged, or abrogated by proceedings in the federal court for the reorganization of the corporation under the Bankruptcy Act, wherein new bonds were issued and holder was compelled to accept new bonds under penalty for contempt, since the court was without jurisdiction to impair the guaranty."

Petitioner states on page 20 of his brief that in the case of *In re Central Funding Corporation*, the plan of reorganization released the guarantor and the approval of this plan indicates that the federal court has the power to modify an existing guaranty. *Petitioner fails to point out to this Honorable Court that the guarantor therein was the debtor being reorganized.* The Circuit Court of Appeals on page 258 states that, "the plan is part of the general plan for the reorganization of the *surety* company." No question could arise if petitioner went through bankruptcy to relieve himself of the guaranty liability but he cannot do it in the reorganization proceedings of the principal obligor.

IV.

That part of the decree of the District Court which attempts to cancel the guaranty is an absolute nullity and subject to collateral attack.

A. The District Court exercised powers to which Section 77B of the Bankruptcy Act had no application and exceeded the powers given it by that section.

It is contended that where a court has jurisdiction of the parties and the subject matter, its decree, however erroneous, can only be attacked on appeal or error; however this rule is subject to an exception equally well settled—that a decree may be void because the court *exceeded* its jurisdiction. In *Armstrong* v. *Obucino*, 306 Ill. 140, the bill prayed for the enforcement of the lien by a sale beyond and contrary to the powers given by the statute for enforcing Mechanic's Liens and the court held that because the court had acquired jurisdiction of the parties and subject matter, it does not follow it could make such a decree as was prayed for; *that if courts transcend their lawful powers, their decrees are void and may be collaterally impeached wherever rights claimed under them are brought in question.* To the same effect are *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 281; *In re Sawyer*, 124 U. S. 200, 220; *U. S.* v. *Walker*, 109 U. S. 258; *Windsor* v. *McVeigh*, 93 U. S. 274; *Adams* v. *Terrell*, 4 Fed. 796, 800; *Novak* v. *Kruse*, 211 Ill. App. 274; *Great Western Tel. Co.* v. *Barker*, 56 Ill. App. 402; *Risley* v. *Phenix Bank of New York*, 83 N. Y. 318, 337.

This Honorable Court, in issuing a writ of mandamus in *Ex Parte Wisner*, 203 U. S. 449, where the federal court had already determined it had and did assume

jurisdiction over the parties and the cause, found that there was an absolute want of authority of the federal court over the case. *Even in view of the fact that the parties had the right to appeal*, this court issued the writ of mandamus which is analogous to a collateral attack upon the judgment of a federal court entered without jurisdiction or power.

In *Hovey* v. *Elliott*, 167 U. S. 409, 444, wherein the Supreme Court of the District of Columbia ordered the answer of the defendant in a chancery suit pending in that court stricken from the files and entered a decree that the bill be taken *pro confesso* because he was held to be guilty of contempt, this court held that that court did not possess the power to disregard an answer and the judgment based upon the exercise of such an assumed power is void for want of jurisdiction *and may therefore be collaterally attacked*. This case is strongly in this respondent's favor because there is no doubt that the Supreme Court of the District of Columbia had jurisdiction over the subject matter in the first instance but *exceeded* its jurisdiction when it ordered the answer of the defendant stricken from the files.

To the same effect is *Reynolds* v. *Stockton*, 140 U. S. 254, wherein this court held that a decree which passes upon questions not at issue in the cause and rendered against a party who had taken no actual part in the litigation subsequent to the filing of his answer, is void and subject to collateral attack. Respondent here took no actual part in the bankruptcy proceedings and the decree which cancels the guaranty is void inasmuch as the guaranty was not legally in issue.

In *Guaranty Trust Co.* v. *Green Cove R. R.*, 139 U. S. 137, this court held that a decree for foreclosure against an absent defendant brought in by publication that was

short of the full period required by law, is a nullity and subject to collateral attack. This case is even stronger than the one at bar inasmuch as the court did have jurisdiction to enter the decree but entered same erroneously and irregularly and did not comply with the *exact* wording of the statute.

In *In re* Southern States Finance Co., 19 F. (2d) 959, there was a collateral attack by a federal court upon another federal court's order of adjudication. There an adjudication of bankruptcy was made by a district court of Delaware and a trustee was qualified. Another petition for adjudication was filed in a district court of North Carolina for the same corporation. A petition was filed in the district court of Delaware to transfer case to the North Carolina district for consolidation which petition was opposed upon the ground that a prior petition had been filed in the Delaware court and the court of North Carolina was without jurisdiction to entertain petition or to make the adjudication that it did make. It was held in the Delaware court that the power essential to the existence and exercise of original jurisdiction was wholly wanting in the Carolina court, that courts of bankruptcy have no jurisdiction other than expressly or by necessary implication conferred upon them by the Constitution and the Statutes.

However, in the case at bar, the District Court did not even have the *power* to cancel the guaranty and not only *exceeded* its powers given by Section 77B but *usurped* another power that was never given to it. It cannot be controverted that such a decree would be subject to collateral attack and there are numerous cases to support the statement.

In re Sawyer, 124 U. S. 200, 220.

The Confiscation Cases, 20 Wall. (U. S.) 92.

Sharon v. *Terry*, 36 Fed. 337, 346.
Rabbit v. *Weber & Co.*, 297 Ill. 491, 495.
Demilly v. *Grosrenaud*, 201 Ill. 272, 273.
Kenney v. *Greer*, 13 Ill. 432.
Ashlock v. *Ashlock*, 360 Ill. 115, 122.
Risley v. *Bank*, 83 N. Y. 318, 337,

And since the District Court proceeded without jurisdiction and power to cancel the guaranty, it matters not how technically correct and precise the form of the record appears. Its decree in part is void and must be so declared; the authority was wholly usurped and the decree was the exercise of arbitrary power under the forms, but without sanction of law.

Ritchie v. *Sayers*, 100 Fed. 520, 532.
People v. *Seelye*, 146 Ill. 189, 221.
Hernandez v. *Drake*, 81 Ill. 34.
Swiggart v. *Harber*, 4 Scam. (Ill.) 364.
Sheldon v. *Newton*, 3 Ohio St. 494.

B. Because the District Court had no power to cancel the guaranty, it was unnecessary to appeal from its orders or decrees because they are subject to collateral attack.

People v. *Leavens*, 288 Ill. 447, 448.
Oakman v. *Small*, 282 Ill. 360, 363.
Sheahan v. *Madigan*, 275 Ill. 373, 377.
Aldridge v. *Matthews*, 257 Ill. 202, 206.

The test of jurisdiction and power is not whether a court of review would reverse the decree rendered. An Appellate Court would reverse a decree on the ground that it was rendered without jurisdiction, but it is begging the question to say that because a reviewing

court on appeal would reverse the decree, therefore it can be attacked in no manner.

People v. *Brewer*, 328 Ill. 472, 482.
O'Connor v. *Board of Trustees*, 247 Ill. 54, 57.

If a court is without jurisdiction over the subject matter, it is not material how the question of jurisdiction is brought to a court's attention.

Chicago Bank of Commerce v. *Carter*, 61 F. (2d) 986, 989.

Jurisdiction and power to adjudicate and to enter judgment cannot be conferred by consent or by failure to raise the question of power in a court of review.

Nixon v. *Michaels*, 38 F. (2d) 420, 423.
Town of Kingston v. *Anderson*, 300 Ill. 577, 582.
Rabbitt v. *Weber & Co.*, 297 Ill. 491, 495.

Consent of the parties to the suit cannot give jurisdiction to the courts of the United States where it has not been conferred by the Constitution and laws.

Cutler v. *William A. Rae*, 7 How. (U. S.) 730.
Mills v. *Brown*, 16 Pet. (U. S.) 525.

CONCLUSION.

Respondent contends that regardless of the fact that the Federal Court did assume jurisdiction and construed the Bankruptcy Act to give it jurisdiction to cancel the guaranty, yet if no such jurisdiction existed, there could never be former adjudication. *The question before this Honorable Court is whether or not the Federal Court had the jurisdiction and power, while sitting in bankruptcy under Section 77B of the Bankruptcy Act for the reorganization of a "debtor" corporation, the principal obligor in this case, to discharge and release the guar-*

antor. If that court had no such jurisdiction, then there could never be a former adjudication of petitioner's rights against the guarantor and the judgment of the Supreme Court of Illinois should therefore be affirmed.

Considerations of hardship can play no part in the decision of this case where the court clearly lacks jurisdiction. *Goldstone* v. *Payne,* 94 F. (2d) 855. Moreover, what hardship can befall petitioner when all he gave up for the release of the guaranty was one (1) share of stock in the debtor corporation? .(R. 34.)

We submit that the decision of the Supreme Court of Illinois is in accord with the decisions of this court and that it rightfully followed the decisions of the United States Circuit Courts of Appeals for the Second and Seventh Circuits in the cases of *In re Diversey Bldg. Corp.,* 86 Fed. (2d) 456; and *In re Nine North Church St., Inc.,* 82 Fed. (2d) 186 and rightfully applied the facts and law of the *Chamblin* case to the facts in the case at bar.

We further submit that the Supreme Court of Illinois *did give* that full faith, credit and effect to the decree of the Federal Court to which it was entitled and the judgment of the Supreme Court of Illinois is in accordance with the fundamental principles of law and justice and should therefore be affirmed.

Samuel M. Bloomberg,
Attorney for Respondent.

David Shipman and
Leo Segall,
Of Counsel.

APPENDIX.

Excerpts From Cases Cited.

Williamson v. *Berry*, 8 How. 495, 540.

"It is an equally well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject matter may be inquired into in every other court, when the proceedings in the former are relied upon and brought before the latter, by the party claiming the benefit of such proceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court or court of common law."

Central Fibre Products Co. v. *Bacher*, 112 S. W. (2d) 372, 376 (Mo.) Nov. 15, 1937.

"We find that the bankruptcy court has no plenary jurisdiction in equity and in application of equity, it is confined to such rules and principles as are conferred by the act. Further, the jurisdiction does not extend beyond controversies properly incidental to the administration of bankrupt estates. *Smith, et al.* v. *Chase National Bank*, 84 F. (2d) 608; *Nixon* v. *Michaels*, 38 F. (2d) 420."

103 A. S. R. 307, 309.

"Of course, if the court did not have jurisdiction over the subject matter, this could be proved by reference to the constitution and laws of the state and the pleadings in the action, *even if the attack upon it were made therein.*" * * *

"The effect of a judgment of a sister state may be avoided by proving that it did not have jurisdiction over the subject matter, or *authority* to *pronounce the judgment*, or to give the relief which it pronounced or gave. * * * Whether the court had jurisdiction over the subject matter of the action or to pronounce the judgment or give the relief in ques-

tion must be determined by an inspection of the laws of the state where the court sat, and of the record in the case in which the judgment was given, for, though the court may have had jurisdction over the subject matter or to grant the relief which it in fact granted * * * still its judgment may be avoided because it assumed to determine a question or to give relief not within the issues in the case before it. (Cases cited.)"

15 R. C. L. 929-932, Sec. 408.

"The clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state applies to the records and proceedings of courts only so far as they have jurisdiction, and the courts of one state are not required to regard as conclusive any judgment of the court of another state which had no jurisdiction of the subject or of the parties." (See many cases cited too numerous to set out.) "It follows, therefore, that the jurisdiction of a court rendering a judgment or decree is always open to inquiry under proper averments, where its conclusiveness is questioned in a court of another state, cases cited." * * *

"Furthermore it may be inquired whether the court had authority to give the relief which it pronounced or purported to give. Note 103 A. S. R. 309. Thus where a judgment of a court of another state declaring a corporation dissolved is in excess of the jurisdiction of the court, it will not be entitled to faith and credit in other states as a judicial proceeding. *Folger* v. *Columbian Ins. Co.*, 99 Mass. 267, 96 Am. Dec. 747. Similarly it has been held that if state laws authorizing garnishment proceedings are not complied with, a judgment therein may be pronounced void in another state without depriving it of that 'faith and credit' to which under the constitution of the United States, it is entitled in the courts of the latter state. *Tourville* v. *Wabash R. Co.*, 143 Mo. 614, 50 S. W. 300, 71 A. S. R. 650."

Thompson v. *Whitman*, 85 U. S. 457, 469.

"On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the Fourth Article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

Ritchie v. *Sayers*, 100 Fed. 520, 532.

"It is well-settled principle that, although a court may have jurisdiction of a case, yet, if it appears from the record that it did not have jurisdiction to enter the decree the particular judgment thereon that it did enter, that decree and judgment may be collaterally impeached."

Standard Oil Co. v. *Missouri*, 224 U. S. 270, 281.

"For even if a court has original general jurisdiction, criminal and civil, at law and an equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based." * * *

"Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be ab-

solutely void; because the court in rendering them would transcend the limits of its authority in those cases."

Risley v. *Phenix Bank of City of New York*, 83 N. Y. 318, 337.

"But a court authorized by statute to entertain jurisdiction in a particular case only, if it undertakes to exercise the power and jurisdiction conferred in a case to which the statute has no application, acquires no jurisdiction, and its judgment is a nullity, and will so be treated when it comes in question, either directly or collaterally."

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 20

J. O. STOLL,

Petitioner,

vs.

WILLIAM GOTTLIEB,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

Your petitioner, William Gottlieb, hereinafter referred to as Respondent, begs and prays that a rehearing and a reconsideration may be granted in the above entitled cause on the following grounds:

I.

The record clearly shows that there was not an actual determination and adjudication of the question of jurisdiction by the Bankruptcy Court.

1. This Court misconstrued the record before it.

This Court erred in determining that the proceedings in the Bankruptcy Court was *res judicata* as to bar an

action by respondent upon the guaranty. The opinion in substance is based upon an application of the *principle of estoppel by judgment* to a record which could not warrant such application. The opinion is based entirely on the assumption that there were findings of the question of jurisdiction which is an obviously erroneous construction of the record.

This court concludes its opinion by stating that "we base our conclusion here on the *fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the respondent.*" (Italics ours.) In order to arrive at this fact, this court had to go beyond the record itself and imply a state of facts that does not exist. If this court would give further consideration to the state of the record, we feel its conclusion would be otherwise.

Just as this court failed to express an opinion as to whether the Bankruptcy Court did or did not have jurisdiction over the subject matter of the guaranty, the Bankruptcy Court itself failed to express an opinion one way or another or to expressly find that it did have jurisdiction to cancel the guaranty. The record substantiates this assertion.

2. The trial court found that the question of jurisdiction was not expressly adjudicated and determined in the Bankruptcy Court.

The trial court, in finding the issues of fact for respondent and against the guarantor, *found as a matter of fact* that there was no *actual* controversy on the question of jurisdiction over the subject matter in the Bankruptcy Court and that that particular question was not fully and fairly investigated, tried and determined adversely to the respondent. *Cooper* v. *Newell*, 173 U. S.

555, 565. *Respondent never admitted at any time* that this question was determined. *Evidence* of these matters was offered by the respondent and *guarantor* and after both parties rested the trial court found that the guarantor did not prove his plea. (Rec. 17.) The burden was on him to prove the estoppel. *Kelliher* v. *Stone & Webster*, 75 F. (2d) 331 (distinguishing *res judicata* and estoppel by judgment).

The guarantor did not stand on his Amended Defense as he elected to do in order to test the legality of his plea. (Rec. 16.) Instead he filed a second Amended Defense setting forth the proceedings in the Bankruptcy Court had upon Respondent's petition, the Debtor's answer thereto, he not being a party therein, and order entered. (Rec. 16.) The Guarantor requested and had a trial of the matters set up in his second Amended Defense and the trial court found that the *question of jurisdiction was not expressly decided in the Bankruptcy Court at any time.* That it was decided was not proved by extrinsic evidence which is permissible. *Packet Company* v. *Sickles*, 5 How., 580, 590, 592; *Russell* v. *Place*, 94 U. S. 606.

3. It does not appear upon the record or by extrinsic evidence that respondent had a finding of the question of jurisdiction determined adversely to him—this should not be left to conjecture.

From the record in this case, which is the only proper proof of the Bankruptcy Court's decree (*Packet Co.* v. *Sickles, supra*) the proceedings taken by respondent in the Bankruptcy Court could not constitute an estoppel nor should the order denying Respondent's petition constitute *res judicata*. *Chapman* v. *Phoenix Nat'l Bk.*, 85

N. Y. 537, 452. *The guarantor was not a party to that proceeding nor did he appear therein.*

The order denying the petition was merely a decision of a motion or summary application which is not to be regarded in the light of *res judicata*, or so far conclusive upon the respondent as to prevent his drawing the same matter in question again in the more regular form of an action. *Hill* v. *Wampler*, 298 U. S. 460; *Denny* v. *Bennett*, 128 U. S. 489. 499. A trial upon which nothing was determined, the merits not being inquired into, (the court simply denying the respondent's petition) cannot support a plea of *res judicata* or have any weight of evidence at another trial *Manhattan Life Ins. Co.* v. *Broughton*, 109 U. S. 121, 125. Although the latter case concerns a judgment upon a non suit, the principles are applicable.

There is no evidence in the record that the Bankruptcy Court denied respondent's petition, *because of a finding that it had jurisdiction and this fact cannot be implied although the point might have been raised.* Respondent has never admitted this fact. The previous adjudication of a Supreme Court of Alabama upon the meaning of a statute did not estop the State, in a subsequent proceeding against the same defendant from denying the constitutionality of the statute nor conclude the court upon that question *although the point might have been raised and determined in the first instance.* *Boyd* v. *Alabama*, 94 U. S. 645. To the same effect is *Ver Mehren* v. *Sirmyer*, 36 F. (2d) 876.

The order denying the petition (Rec. 38) *might have been based on various other reasons.* The proof to show an estoppel by judgment and the evidence must be *clear, certain and convincing.* *De Sollar* v. *Hanscome*, 158 U. S. 216, 221. In this state of the record there is an uncer-

tainty as to the precise questions raised and determined in the Bankruptcy proceedings and it does not appear upon the record or by *extrinsic evidence*, that Respondent had a finding of the question of jurisdiction determined adversely to him at any time. (R. 35.) *This cannot be left to conjecture. Russell* v. *Place*, 94 U. S. 606, 608. *Any uncertainty as to what was determined in the Bankruptcy Court should be resolved against the guarantor.*

In the last mentioned case, this Court stated on page 610:

> "According to Coke, an estoppel must 'be certain to every intent,' and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence."

4. It does not appear upon the record or by extrinsic evidence that any bondholder had a finding of the question of jurisdiction determined adversely to him—this should not be left to conjecture.

The certified copy of the decree of the Bankruptcy Court confirming the plan of reorganization set forth that the Court "finds" *that no objections have been made to the Plan of Reorganization filed herein by the debtor.* (R. 14, 29.) The trial court, in finding the issues against the defendant guarantor found this fact to be true that the Bankruptcy Court did not expressly pass on this question of jurisdiction at any time during the *reorganization proceedings because* the question of jurisdiction, as an objection, was never brought to the court's attention by other bondholders. *The record is clear and unambiguous on this point.* Moreover, if objections were made, the record does not show the reasons nor any findings of jurisdiction in overruling them.

5. It does not appear upon the record or by extrinsic evidence that respondent did have "his day in court" in the Bankruptcy Court.

While the enforcement of the rule of *res judicata* is essential to secure the peace and repose of society, it is equally true that to enforce the rule upon *unsubstantiated grounds* would work injustice to respondent. This court must therefore be careful to see that the questions of respondent's right to sue upon, or the question to cancel the guaranty were *adjudicated* and *decided* and the rights of the respondent thereby concluded. *Vicksburg* v. *Henson*, 231 U. S., 259, 268.

The doctrine of *res judicata* and estoppel by judgment rests upon a sound foundation of justice but if this Honorable Court's judgment is permitted to stand, respondent will never be able to obtain justice. *He has never had his "day in court," and the record bears this out.* (R. 35, 38.) His right to sue upon his contract of guaranty which has always been held inviolate, will have been denied if this court's judgment is permitted to stand. Furthermore, on the principle that estoppels must be mutual, no person is entitled to take advantage of a former judgment or decree, as decisive in his favor of a matter in controversy (if one can call the proceedings cancelling the guaranty a *controversy*) unless he would have been prejudiced by it had the decision been the other way. 2 Black on Judgments, Sec. 534.

6. Forsyth v. Hammond, 166 U. S. 506, distinguished.

This case and the one at bar may be distinguished. In the cited case, the *highest court* of the State of Indiana, in a *final appeal*, held that the lower court had jurisdiction over the subject matter. In that case *there was an*

actually contested issue of want of jurisdiction in all of the state courts and a finding in a matter that was peculiarly within the domain of State control, to be finally and absolutely determined by the State Supreme Court. In this case, there is *no evidence of an actually contested issue* as to jurisdiction (R. 14, 29, 38) and there is no collateral attack upon the finding of a *highest* nor even a lower tribunal in a matter to be finally and absolutely determined by that court.

II.

The record did not preclude the Supreme Court of Illinois nor does it now preclude this Court from inquiring into the question of jurisdiction for proper determination.

1. This Court should clarify the law and settle litigation involving the same questions in lower courts.

The opinion does not discuss or decide the question of the power of the Bankruptcy Court to cancel a Guaranty in proceedings to reorganize a debtor corporation under Section 77B of the Bankruptcy Act.

We know of important litigation in the lower courts depending on the question of the power to cancel the Guaranty and involving similar facts. We believe such litigation will be confused and petitions for certiorari invited by this court's evasion of the primary and principal issue so rightfully presented. The question is squarely and simply presented in this case and we believe that a discussion of it and a decision would clarify the law, settle litigation and save time of the courts, including this court.

2. The Supreme Court of Illinois found that neither the record nor extrinsic evidence sustained a finding of the question of jurisdiction.

The Supreme Court of Illinois found that as a matter of law the plea of *res judicata* as set forth in the record was bad not only because the Bankruptcy Court lacked jurisdiction to cancel the guaranty, but also, *the plea as a matter of fact was not proved in the trial court.* The Supreme Court of Illinois found that no objections to the plan cancelling the guaranty had been made. (R. 64.) Guarantor's contentions were before the Supreme Court of Illinois at all times. Therefore, if there was no finding that the Bankruptcy Court did or did not have jurisdiction to cancel the guaranty, it was within the province of the Supreme Court of Illinois to decide as it did. A court's jurisdiction can always be *inquired* into when the issue is raised for the first time in a collateral proceeding, the issue not having been actually litigated and determined in the Bankruptcy Court. (R. 67.)

3. As a matter of law and in all fairness and justice, respondent should not be barred merely because the Bankruptcy Court signed the decree confirming the plan of reorganization and denied respondent's petition to modify same.

Respondent begs the Court's indulgence to permit him to quote the following case at such length as is necessary to show the application thereof to this case *if it can be assumed that the record did show that respondent's petition in the Bankruptcy Court was denied because the court did actually find thereupon or at any time that it had jurisdiction to cancel the guaranty.*

In *Vallely* v. *Northern Fire Insurance Co.*, 254 U. S. 348, an insurance corporation was adjudged bankrupt in

an involuntary proceeding upon due service of process and default. *The corporation did not appeal from the adjudication but acquiesced therein and even aided the trustee. After time for appeal had expired,* the corporation moved successfully in the Bankruptcy Court that the adjudication should be vacated and proceedings dismissed because the court lacked jurisdiction to adjudge an insurance company a bankrupt. It was held therein that even *after the time* for appeal had expired, the corporation is not estopped from thereafter questioning the validity of the adjudication and the power of the court; *there cannot be res judicata or estoppel if the court has no jurisdiction even though the parties consented to the adjudication and order.*

It may be argued that this case can be distinguished because the motion to vacate was made in the Bankruptcy Court and was therefore a direct attack. *In substance,* this case involves a *collateral attack* on a prior bankruptcy adjudication in another bankruptcy court inasmuch as the time for appeal had expired.

Mr. Justice McKenna, in the opinion of this court stated on pages 353 and 354:

> "It is, however, insisted * * *. 'if the court in the exercise of its jurisdictional power, reached a wrong conclusion, the judgment is not void; it is merely error to be corrected on appeal or by motion to vacate, timely made, but as long as it stands, it is binding on everyone.' There is plausibility in the propositions taken in their generality, but there are opposing ones. Courts are constituted by authority and they cannot go beyond the powers delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal."

In looking at the bankruptcy provisions pertinent to this case, this Court goes on to say on page 355:

> "The effect of these provisions is that there is no statute of bankruptcy as to except corporations, and necessarily there is no power in the District Court to include them. In other words, the policy of the law is to leave the relation and remedies of * * * insurance * * * corporations to their creditors and their creditors to them, to other provisions of the law. * * *
>
> If consent can confirm jurisdiction, why not initially confer jurisdiction? * * * *For a court to extend the act to corporations of either kind is to enact a law, not to execute one.*" (Italics ours.)

The Bankruptcy Court here by extending Section 77B to cancel the guaranty enacted a new law.

In following principles laid down in the Vallely case (*supra*), this Court in *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25, 29; *Tilt* v. *Kelsey*, 207 U. S. 43, 51; and *Andrews* v. *Andrews*, 188 U. S. 14, 16, 17, 38, held that a court cannot conclude all persons interested by its *mere assertion of its own power* even where its power depends upon a fact *and it finds that fact.* See *Chapman* v. *Phoenix Nat'l Bk.*, 85 N. Y. 437, 452.

PRAYER.

In view of the fact that this Court possibly has inadvertently overlooked the matters hereinabove pointed out, petitioner, William Gottlieb, begs and prays this Court to reconsider this cause; petitioner further prays that this Court find after further consideration of the record that it had erred in finding that the record did *clearly* show that the bankruptcy proceedings were *res judicata* to petitioner's cause of action on the guaranty; your petitioner further prays that this petition for rehearing be granted and that the opinion of this Honorable Court may be set aside and declared null and void and that the judgment of the Supreme Court of the State of Illinois be affirmed.

DAVID SHIPMAN,
Counsel for Respondent,
William Gottlieb.

LEO SEGALL and
SAMUEL M. BLOOMBERG,
Of Counsel.

CERTIFICATE OF COUNSEL.

This is to certify that the above petition for rehearing is presented in good faith in the belief that petitioner, William Gottlieb, has a meritorious claim that this court's opinion is contrary to the law and facts, and is not interposed merely for the purpose of delay.

DAVID SHIPMAN,
Counsel for Respondent.

LEO SEGALL and
SAMUEL M. BLOOMBERG,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 20.—October Term, 1938.

J. O. Stoll, Petitioner,
vs.
William Gottlieb.

On Writ of Certiorari to the Supreme Court of Illinois.

[November 21, 1938.]

Mr. Justice Reed delivered the opinion of the Court.

This certiorari was allowed to review a judgment of the Supreme Court of Illinois. That court had denied effect to a plea of res judicata arising from orders of a district court in bankruptcy. Provisions declaring the supremacy of the Constitution and the extent of the judicial power and authorizing necessary and proper legislation to make the grants effective confer jurisdiction upon this Court to determine the effect to be given decrees of a court of the United States in state courts.[1] As the contention is that the ruling below disregarded decrees of a court of the United States it raised a federal question reviewable under Section 237b of the Judicial Code.[2]

The admission of facts and uncontroverted allegations of the pleadings show that Ten Fifteen North Clark Building Corporation filed a petition for reorganization on June 20, 1934, under Section 77B of the Bankruptcy Act in the United States District Court for the Northern District of Illinois; that the petition was approved as properly filed shortly thereafter, and that notice of the proceedings was given to the creditors, one of whom was respondent William Gottlieb. A proposed plan of reorganization was filed by the debtor which provided for the substitution of one share of common stock in the Olympic Hotel Building Corporation for each $100 principal amount of the outstanding first mortgage, 6½% gold

1 Crescent City Live Stock Co. *v.* Butcher's Union, 120 U. S. 141, 146; Embry *v.* Palmer, 107 U. S. 3, 9; Metcalf *v.* Watertown, 153 U. S. 671, 676; Atchison, Topeka & S. F. *v.* Sowers, 213 U. S. 55, 65.

2 Dupasseur *v.* Rocherseau, 21 Wall. 130, 134; Crescent City Live Stock Co. *v.* Butcher's Union, 120 U. S. 141, 142; Des Moines Nav. Co. *v.* Iowa Hstd. Co., 123 U. S. 552, 559; Pittsburgh, etc. Ry. *v.* Long Island Loan & Trust Co., 172 U. S. 493, 507; Motlow *v.* Missouri, 295 U. S. 97, 98.

bonds of the debtor corporation, the discharge of the bonds and the cancellation of a guaranty endorsed on them. The guaranty was one of J. O. Stoll, petitioner here, and S. A. Crowe, Jr., to pay the bond. Its material provisions are stated below.[3] The extinction of the personal guaranty was in consideration "for the transfer of all the assets of said Debtor [i.e., the Building Corporation] to the Olympic Hotel Building Corporation and the surrender of the said Common Stock of the Debtor." Crowe and Stoll, together with other stockholders of the debtor, "filed their acceptances in writing" of the plan.

On notice to respondent and a hearing at which he did not appear the proposed plan of reorganization with the provision for the extinction of the guaranty was confirmed over the objections of creditors of the same class as respondent. The confirmation provided that all creditors of the debtor should be bound. It also appears that, in accordance with the plan, the guarantors caused the assets of the debtor to be transferred to the new corporation and surrendered the capital stock of the debtor. After the institution of the present action in the state court Gottlieb filed a petition in the proceedings for reorganization of the Ten Fifteen North Clark Building Corporation praying that an order be entered vacating or modifying the decrees and orders entered in the proceedings confirming the plan of reorganization, on the ground that the district court in proceedings for reorganization did not have power or jurisdiction to cancel the guaranty. An order was entered denying this petition. No appeal was taken from any of the bankruptcy orders.

Subsequent to the confirmation of the plan of reorganization but before the petition to vacate these orders Gottlieb began an action in the Municipal Court of Chicago against the guarantors

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[3] "GUARANTY.

"For Value Received, the undersigned, Do Hereby Guarantee the payment of the within bond and the interest thereon, at the maturity thereof either by the terms of said bond or of any agreement extending the time of payment thereof, or by anticipation of maturity at the election of the legal holder or owner thereof, in accordance with any provision of said bond or of the trust deed given to secure the same, or of any extension agreement; and do hereby absolutely guarantee the payment of the respective interest coupons, given to evidence the interest on said bond, and all extension coupons, at their respective dates of maturity, and all interest on said coupons, and do hereby absolutely guarantee the full and complete performance by the maker of the trust deed given to secure the said bonds and coupons, and its successors and assigns, of all of the terms, provisions, covenants and agreements of the said trust deed and of any such extension agreement."

Crowe and Stoll to recover upon their guaranty of three of the $500 bonds of Ten Fifteen North Clark Building Corporation. Crowe was not served with summons. Stoll defended on the ground that the order of the bankruptcy court confirming the plan of reorganization with release of his guaranty and its further order, denying Gottlieb's petition to set aside the decree providing for the release of the guaranty, were res judicata.

The Municipal Court granted the relief sought by the bondholder, the appellate court reversed and its judgment was in turn reversed by the Supreme Court of Illinois which affirmed the judgment of the Municipal Court.[4] Two justices dissented.

The Congress enacted, as one of the earlier statutes, provisions for giving effect to the judicial proceedings of the courts. This has long had its present form.[5] This statute is broader than the authority granted by Article Four, section one, of the Constitution to prescribe the manner of proof and the effect of the judicial proceedings of states. Under it the judgments and decrees of the Federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances.[6] But where the judgment or decree of the Federal court determines a right under a Federal statute, that decision is "final until reversed in an appellate court or modified or set aside in the court of its rendition."[7] As this plea was based upon an adjudication under the reorganization provisions of the Bankruptcy Act, effect as res judicata is to be given the Federal order, if it is concluded it was an effective judgment in the court of its rendition. The problem before the Supreme Court of Illinois was not one of full faith and credit but of res

[4] 368 Ill. 88.

[5] Rev. Stat. Sec. 905. "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

[6] Dupasseur *v.* Rochereau, 21 Wall. 130; Embry *v.* Palmer, 107 U. S. 3, 9; cf. Metcalf *v.* Watertown, 153 U. S. 671.

[7] Deposit Bank *v.* Frankfort, 191 U. S. 499, 520.

judicata. In this particular case, a federal question was involved. This was the power of the Federal courts to protect those who come before them relying upon constitutional rights or rights given, as in this case, through a statute enacted pursuant to constitutional grants of power.

The inquiry is to be directed at the conclusiveness of the order releasing the guarantor from his obligation, assuming the Bankruptcy Court did not have jurisdiction of the subject matter of the order, the release in reorganization of a guarantor from his guaranty of the debtor's obligations.[8]

A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court.[9] Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant,[10] or whether its geographical jurisdiction covers the place of the occurrence under consideration.[11] Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter.[12] An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter. When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is res judicata. After a Federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again

[8] We express no opinion as to whether the Bankruptcy Court did or did not have jurisdiction of the subject matter. Cf. In re Diversey Building Corp., 86 F. (2d) 456; In re Nine North Church Street, Inc., 82 F. (2d) 186; Union Trust Co. *v.* Willsea, 275 N. Y. 164, 167.

[9] As illustrations of the exercise of this power, see Texas & Pac. Ry. *v.* Gulf, etc. Ry., 270 U. S. 266, 274; Matter of Gregory, 219 U. S. 210, 217.

[10] Baldwin *v.* Traveling Men's Ass'n, 283 U. S. 522.

[11] Jones *v.* United States, 137 U. S. 202.

[12] Chicago Life Ins. Co. *v.* Cherry, 244 U. S. 25, 29.

into that jurisdictional fact.[13] We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court[14] making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.

Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

That a former judgment in a state court is conclusive between the parties and their privies in a Federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation, has been determined by this Court in *Forsyth* v. *Hammond*.[15] The respondent, Caroline M. Forsyth, sought by injunction in the Federal court to forbid the City of Hammond from collecting taxes on certain lands, annexed to the city by an earlier state court decree. The city contended that the earlier decree was decisive, the respondent that it was void because the enlargement of a city was a matter of legislative, not judicial, cognizance. Without determining the issue whether annexation itself is a function solely of the legislature, this Court upheld the contention of the city on the ground that the respondent had taken an appeal to the Supreme Court of Indiana from the earlier decree of the trial court against her in the annexation proceedings, and had in that appeal attacked the validity of the decree on the ground of lack of jurisdiction. "Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the Supreme

[13] Chicago Life Ins. Co. *v.* Cherry, 244 U. S. 25, 30; Baldwin *v.* Traveling Men's Ass'n, 283 U. S. 522, 525; Davis *v.* Davis, No. 16, October Term 1938, decided November 7, 1938.

[14] The Bankruptcy Court is one of general jurisdiction. Fairbanks Shovel Co. *v.* Wills, 240 U. S. 642, 649.

[15] 166 U. S. 506, 515.

Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum."[16]

Other instances closely approaching the line of this case may be examined.

In *Des Moines Navigation and Railroad Company* v. *Iowa Homestead Company*,[17] this Court was called upon to resolve a controversy over the effect of a judgment of the Federal courts in a matter beyond their jurisdiction. The suit was brought by the Homestead Company in the state court to recover certain taxes which were the subject of litigation between the same parties in *Homestead Company* v. *Valley Railroad*, 17 Wallace 153. In the earlier case the decision had been adverse to the Homestead Company. When the Navigation Company pleaded the earlier decree in bar to the later action, it was met with the reply that the courts of the United States, which had rendered the earlier decree "had no jurisdiction of said suit and no legal power or authority to render said decree or judgment." The reason for this assertion was that the earlier suit had been instituted in a state court by the Homestead Company, an Iowa corporation, against various non-resident defendants and the Navigation Company, also an Iowa corporation. The individual defendants caused a removal to the Federal court and all defendants, including the Navigation Company, appeared, filed answers and defended the action. The Homestead Company likewise appeared and actually contested issues in dispute with the Navigation Company. The litigation eventually reached this Court and was decided without reference to the lack of jurisdiction. In the later case this Court assumed that the exercise of jurisdiction by the United States Circuit Court over the controversy between the two Iowa corporations was improper. It was held, however, that the earlier decree was a "'prior adjudication of the matters in controversy" and a bar to the later action.

A few years later this Court had occasion to examine again the question of the effect of a former adjudication by a United States Circuit Court in a case where this Court assumed the Circuit Court had jurisdiction of the parties but not of the subject matter. The earlier adjudication was pleaded in bar to a suit to quiet title in a state court sitting in the same state as the Circuit Court. The

[16] *Id.* 517.

[17] 123 U. S. 552.

state courts denied effect to the Circuit Court decree. On writ of error to the Supreme Court of Oregon this Court answered the contention that the ground upon which "the Federal court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States" in these words:

"But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court."[18]

The decision in the *Des Moines* case is not precisely parallel with the circumstances of the present case because the determination was based upon diversity of citizenship between other parties to the controversy[19] and *Dowell* v. *Applegate* may likewise be seen to deviate slightly since there was color of jurisdiction in the Federal court by reason of certain allegations as to violation of Acts of Congress in the stamping of the deeds.

A case likewise closely approaching the circumstances of the present controversy is *Vallely* v. *Northern Fire Ins. Co.*[20] A corporation alleged to be engaged in the insurance business was adjudicated an involuntary bankrupt in the teeth of the Bankruptcy Act, section four b, that "any moneyed . . . corporation, except a . . . insurance . . . corporation, . . . may be adjudged an involuntary bankrupt." There was a default, acquiescence and aid to the trustee by the bankrupt. After the time for review of the adjudication had expired, the bankrupt filed a motion to vacate the adjudication as null and void. This Court upheld the motion. It was pointed out that a determination of a jurisdictional fact, such as whether an alleged bankrupt is a farmer, binds,[21] but that where there was no statute of bankruptcy applicable "necessarily there is no power in the District Court to include," the excepted corporation. It was thought that to recognize the binding effect of the judgment would be to extend the jurisdiction. This decision is inapplicable here because there was not an actually contested

[18] Dowell v. Applegate, 152 U. S. 327, 340.
[19] Vallely v. Northern Fire Ins. Co., 254 U. S. 348, 354.
[20] 254 U. S. 348.
[21] Denver First Nat. Bank v. Klug, 186 U. S. 202.

issue and order as to jurisdiction. The case is also distinguishable because the motion to vacate was made in the same bankruptcy proceeding as the order. We do not comment upon the significance of this variable.

To appraise the cases dealing with status and transfer of title to real estate seems outside the scope of the present inquiry. The rule applied here may or may not be applicable in instances where the courts with jurisdiction of the later controversy are passing upon matters of status and real estate titles.[22]

It is frequently said that there are certain strictly jurisdictional facts, the existence of which is essential to the validity of proceedings and the absence of which renders the act of the court a nullity. Examples with citations are listed in *Noble* v. *Union River Logging Railroad*.[23] For instance, service of process in a common law action within a state, publication of notice in strict form in proceedings in rem against absent defendants, the appointment of an administrator for a living person, a court martial of a civilian. Upon the other hand there are quasi-jurisdictional facts, diversity of citizenship, majority of litigants, and jurisdiction of parties, a mere finding of which, regardless of actual existence, is sufficient. As to the first group it is said an adjudication may be collaterally attacked, as to the second it may not. We do not review these cases as we base our conclusion here on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the respondent. That determination is res adjudicata of that issue in this action, whether or not power to deal with the particular subject matter was strictly or quasi-jurisdictional.

Judgment reversed.

Mr. Justice McReynolds concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[22] Cf. Andrews v. Andrews, 188 U. S. 14; S. C. 176 Mass. 92; Fall v. Eustin, 215 U. S. 1; Carpenter v. Strange, 141 U. S. 87, 105.

[23] 147 U. S. 165.

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